28

No. 94-1941-CFX
Status: GRANTED

Title: United States, Petitioner
v.
Virginia, et al.

Docketed:
May 26, 1995

Court: United States Court of Appeals for the Fourth Circuit

Vide:
94-2107

Counsel for petitioner: Solicitor General

Counsel for respondent: Olsen,Theodore B., Patterson Jr.,Robert H., Bell,Griffin B., Poff,William B.

40 printed copies ea pet & appd

Entry	Date	Note	Proceedings and Orders
33	Dec 15 1994	X	Brief amici curiae of Dr. Kenneth E. Clark, et al. filed.
1	Apr 14 1995	G	Application (A94-776) to extend the time to file a petition for a writ of certiorari from April 26, 1995 to May 26, 1995, submitted to The Chief Justice.
3	Apr 14 1995		Application for extension of time to file petition and order granting same until May 26, 1995 (Chief Justice, April 18, 1995).
2	Apr 18 1995		Application (A94-776) granted by the Chief Justice extending the time to file until May 26, 1995.
4	May 26 1995	G	Petition for writ of certiorari filed.
5	May 26 1995		Appendix of petitioner filed.
6	Jun 23 1995		Brief of respondents Virginia, et al. in opposition filed.
7	Jun 26 1995		Brief amici curiae of National Women's Law Center, et al. filed.
8	Aug 2 1995		DISTRIBUTED. September 26, 1995 (Page 74)
9	Aug 16 1995	X	Reply brief of petitioner filed.
11	Oct 2 1995		REDISTRIBUTED. October 6, 1995 (Page 23)
12	Oct 5 1995		Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 16, 1995. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 15, 1995. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, January 3, 1996. Rule 29.2 does not apply. Justice Thomas OUT.
			**********
14	Oct 30 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Fourth Circuit (Box)
13	Nov 1 1995		SET FOR ARGUMENT WEDNESDAY, JANUARY 17, 1996. (1ST CASE)
16	Nov 7 1995		Record filed.
		*	Original record proceedings United States District Court for the Western District of Virginia (4 BOXES)
15	Nov 13 1995	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
17	Nov 16 1995		Brief of petitioners Virginia, et al. filed. VIDED.
18	Nov 16 1995		Brief of petitioner United States filed. VIDED.
19	Nov 16 1995		LODGING consisting of 10 copies of a spiral bound volume

3 pp

No. 94-1941-CFX

Entry	Date	Note	Proceedings and Orders
			of materials from the record submitted by the Solicitor General.
20	Nov 16 1995		Brief amicus curiae of Nancy Mellette filed. VIDED.
21	Nov 16 1995		Brief amici curiae of Employment Law Center, et al. filed. VIDED.
22	Nov 16 1995		Brief amici curiae of Wells College, et al. filed. VIDED.
23	Nov 16 1995		Brief amici curiae of Bennett College, et al. filed. VIDED.
24	Nov 16 1995		Brief amici curiae of Lieutenant Colonel Rhonda Cornum, et al. filed.
25	Nov 16 1995		Brief amici curiae of National Women's Law Center, et al. filed.
26	Nov 16 1995		Brief amici curiae of American Association of University Professors, et al. filed.
27	Nov 16 1995		Brief amici curiae of Maryland, et al. filed.
28	Nov 20 1995		CIRCULATED.
29	Dec 4 1995		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED. Justice Thomas OUT.
32	Dec 14 1995	X	Brief amici curiae of South Carolina, et al. filed.
30	Dec 15 1995	X	Brief of respondents Virginia, et al. filed. VIDED.
31	Dec 15 1995		LODGING consisting of ten copies of Defendants' Third Status Report submitted by Counsel for Virginia, et al.
34	Dec 15 1995	X	Brief amici curiae of Independent Women's Forum, et al. filed.
35	Dec 15 1995	X	Brief amici curiae of Center for Military Readiness, et al. filed. VIDED.
36	Dec 15 1995	X	Brief amicus curiae of Mary Baldwin College filed. VIDED.
37	Dec 15 1995	X	Brief amici curiae of Wyoming and Pennsylvania filed. VIDED.
38	Dec 19 1995	G	Motion of Women's Schools Together, Inc., et al. for leave to file a brief as amici curiae filed.
39	Dec 29 1995	G	Motion of South Carolina Institute of Leadership for Women for leave to file a brief as amicus curiae filed.
40	Jan 3 1996		Reply brief of petitioners Virginia, et al. filed. VIDED.
41	Jan 3 1996	X	Reply brief of petitioner United States (TBP) filed. VIDED.
42	Jan 8 1996		Motion of Women's Schools Together, Inc., et al. for leave to file a brief as amici curiae GRANTED. Justice Thomas OUT.
43	Jan 8 1996		Motion of South Carolina Institute of Leadership for Women for leave to file a brief as amicus curiae GRANTED. Justice Thomas OUT.
44	Jan 17 1996		ARGUED.

94-1941

No.

Supreme Court, U.S.
FILED
MAY 26 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

COMMONWEALTH OF VIRGINIA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a State that provides a rigorous military-style public educational program for men can remedy the unconstitutional denial of the same opportunity to women by offering them a different type of single-sex educational program deemed more suited to the average woman.

2. Whether coeducation is the required remedy in the context of this case.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following were parties to the proceedings in the courts below: George F. Allen, Governor of the Commonwealth of Virginia; Virginia Military Institute; Joseph M. Spivey, III, President of the Virginia Military Institute Board of Visitors; John Williams Knapp, Superintendent of Virginia Military Institute; The Board of Visitors of Virginia Military Institute; VMI Foundation, Incorporated; VMI Alumni Association; The Virginia State Council of Higher Education and its Members and Officers; Thomas N. Downing; Elizabeth P. Hoisington, Brig. Gen.; Robert Q. Marston; A. Courtland Spotts, III; Daniel F. Flowers; B. Powell Harrison, Jr.; Robert H. Spilman; Samuel E. Woolwine; James W. Enochs, Jr.; William A. Hazel; Harvey S. Sadow; Douglas K. Baumgartner; Daniel D. Cameron; Glen N. Jones; John W. Roberts; and Gordon K. Davies.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No.

UNITED STATES OF AMERICA, PETITIONER

v.

COMMONWEALTH OF VIRGINIA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals regarding remedy (App. 1a-52a) is reported at 44 F.3d 1229. The opinion of the district court regarding remedy (App. 53a-131a) is reported at 852 F. Supp. 471. The opinion of the court of appeals regarding liability (App. 134a-157a) is reported at 976 F.2d 890. The opinion of the district court regarding liability (App. 158a-245a) is reported at 766 F. Supp. 1407.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1995. The court of appeals voted sua sponte not to rehear the case en banc, and entered an order to that effect on April 28, 1995 (App. 246a-257a). On April 18, 1995, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 26, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

1. The Virginia Military Institute (VMI) is a public, state-supported military college in Lexington, Virginia. Since its founding in 1839, VMI has maintained a policy of admitting only men to its four-year undergraduate degree program. All of the fourteen other public colleges in Virginia are coeducational. Approximately 1300 male students are enrolled at VMI. VMI has a strong reputation for producing leaders, and has an exceptionally loyal and powerful alumni network that includes men who have distinguished themselves in military and civilian life. App. 137a-138a. "VMI alumni overwhelmingly perceive that their VMI educational experience contributed to their obtaining personal goals," *id.* at 205a, and VMI enjoys the largest endowment on a per-student basis of any undergraduate institution in the United States, *id.* at 130a.

VMI's mission is to produce "citizen-soldiers," described as "educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary." App. 6a, 139a. VMI uses an "adversative" method of character development and leadership training not used by any other college. The adversative method is based on "English public schools" and "earlier military training," although it is no longer in use at the United States military academies. *Id.* at 139a, 192a. The method "emphasizes physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of values." *Id.* at 139a; see *id.* at 191a-192a. "As a consequence of completing the rigorous tasks [required by the adversative method], succeeding, and actually graduating from VMI, VMI cadets have a sense of having overcome almost impossible physical and psychological

odds. They have been put through great physical pressures and hazards, and just to have made it yields a feeling of tremendous accomplishment." *Id.* at 205a.

VMI's adversative method is implemented through a pervasive military-style system. App. 140a-141a, 191a-200a. At VMI, the method includes the "rat line," which is a seven-month regimen, comparable to Marine boot camp, during which first-year cadets, or "rats," are "treated miserably," like "the lowest animal on earth." *Id.* at 194a-195a. "Rats" are subjected to a strict system of punishments and rewards that creates "a sense of accomplishment and a bonding to their fellow sufferers and former tormentors." *Id.* at 194a. The "class system" assigns roles to each class of cadets within a rigid hierarchy in order to "cultivat[e] leadership." *Id.* at 196a. "After the rat line strips away cadets' old values and behaviors, the class system teaches and reinforces through peer pressure the values and behaviors that VMI exists to promote." *Ibid.* VMI's program also includes the "dyke system," an arrangement by which each rat is assigned a senior as a mentor to give him some "relief from the extreme stress of the rat line." *Id.* at 196a-197a. VMI requires cadets to "live within a military framework; they wear the cadet uniform at the Institute, eat most meals in the mess hall, live in a barracks, and regularly take part in parades and drills." 91-1690 (*VMI I*) C.A. App. 52, ¶ 35 (Stipulations of Fact). "[T]he most important aspects of the VMI educational experience occur in the barracks." App. 197a-198a.[1] There, cadets live at close quarters with one another, three to five together in stark and unattractive rooms, with poor ventilation, unappealing furniture, windowed doors with no locks and no coverings on the windows. *Id.* at 199a. In the barracks, "a cadet is totally removed from his social background," and placed in an environment the

[1] An expert called by VMI testified that "[p]roducing a VMI graduate without the barracks experience would be equivalent to dressing someone up in the uniform of a Marine without first sending them to boot camp." App. 198a.

principal object of which is "to induce stress." *Ibid.* The educational program at VMI includes liberal arts, science and engineering courses, and VMI confers both Bachelor of Arts and Bachelor of Science degrees. *Id.* at 200a.

Although VMI has always restricted admission to men, some women "would want to attend [VMI] if they had the opportunity." App. 174a; see also *id.* at 231a, 232a (recruitment of women would likely yield a 10% female student body at VMI). Despite its male-only admissions policy, between the fall of 1988 and the summer of 1990 VMI received 347 letters from women inquiring about admission, or otherwise indicating interest in attending VMI. *Id.* at 229a. It is not disputed that some women can succeed within the VMI-type methodology and are capable of doing all of the individual activities required of VMI cadets, including the physical training and military drills. *Id.* at 76a, 223a, 234a. Thus, the VMI methodology "could be used to educate women." *Id.* at 76a; see *id.* at 155a.

2. On March 1, 1990, the United States sued the Commonwealth of Virginia, the Governor of Virginia, VMI, its Superintendent and Board of Visitors, and others responsible for the operation of VMI and for coordination of Virginia's system of higher education in the United States District Court for the Western District of Virginia.[2] The suit was filed pursuant to 42 U.S.C. 2000c-6 in response to a complaint filed with the Attorney General by a female high school student seeking admission at VMI. The United States alleged that VMI's male-only admissions policy violated the Equal Protection Clause of the Fourteenth Amendment, and sought an

[2] As a result of the then-Governor's position that no person should be denied admission to a state-supported college on account of sex, neither he nor the Commonwealth of Virginia participated at the liability phase in defending VMI's male-only admissions policy. App. 142a. The VMI Foundation and the VMI Alumni Association, both private organizations, intervened as defendants. *Id.* at 160a.

order enjoining the respondents from excluding women and from otherwise discriminating on the basis of sex in the operation of VMI. App. 141a.

On June 14, 1991, the district court entered judgment in favor of respondents. App. 158a-245a. It concluded that VMI's male-only admissions policy met the test for permissible gender classifications set forth in *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982). Under that test, the Commonwealth was required to show that the exclusion of women from VMI was supported by an "exceedingly persuasive justification." *Id.* at 724. "Th[at] burden is met only by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Ibid.* (internal quotation marks omitted).

The district court held that the male-only admissions policy was substantially related to the important state objective of promoting a diversity of educational offerings, including "single-gender diversity," within Virginia's system of higher education. App. 167a. The court found that "[i]nstitutions of higher education that admit only males contribute greatly to diversity in higher education, and should be preserved." *Id.* at 188a. The validity of VMI's exclusionary admissions policy was further reinforced for the district court because "some aspects of the distinctive [VMI] method would be altered if it were to admit women." *Id.* at 173a; see *id.* at 170a. The court credited testimony of one of VMI's expert witnesses that "the adversative model of education is simply inappropriate for the vast majority of women." *Id.* at 171a. Thus, although "some women will thrive in the adversative environment," such exceptional women need not be admitted because "educational systems are not designed for the exception, but for the mean." *Id.* at 172a. In sum, although the court found that "[w]omen are denied a unique educational opportunity that is available only at VMI," *id.* at 218a, "[t]he VMI Board has decided that

providing a distinctive, single-sex educational opportunity is more important than providing an education equally available to all," *id.* at 170a.

3. The court of appeals vacated and remanded. App. 134a-156a (*VMI I*). It held that respondents "failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type education to men and not to women." *Id.* at 155a.[3] The court specifically rejected the district court's conclusion that Virginia has a policy of providing single-gender education to promote a diverse array of options. *Id.* at 152a-153a.[4] In addition, Virginia's delegation of authority to individual institutions to set educational policy undermined the stated goal of system-wide diversity, because "no explanation is apparent as to how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions." *Id.* at 154a. Therefore, "[a]s the record stands, * * * evidence of a legitimate and substantial state purpose is lacking." *Id.* at 155a.

The court of appeals nonetheless concluded that VMI's institutional mission of "developing citizen soldiers" could justify its male-only admissions policy, App. 145a-151a,

[3] See App. 137a (Virginia had not "advanced any state policy by which it can justify its determination, under an announced policy of diversity, to afford VMI's unique type of program to men and not to women"); *id.* at 152a ("the Commonwealth of Virginia has not revealed a policy that explains why it offers the unique benefit of VMI's type of education and training to men and not to women"); *id.* at 153a-154a ("If VMI's male-only admissions policy is in furtherance of a state policy of 'diversity,' the explanation of how the policy is furthered by affording a unique educational benefit only to males is lacking. A policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender.").

[4] The court noted that the only policy statement in the record "in which the Commonwealth has expressed itself with respect to gender distinctions" required that its colleges and universities treat students "*without regard to sex, race, or ethnic origin.*" App. 153a.

as long as women would also have an opportunity to obtain "the unique benefits of a VMI-type of education," *id.* at 155a-156a. The court agreed with the district court that "single-sex education is pedagogically justifiable," *id.* at 151a, and that "changes necessary to accommodate coeducation would tear at the fabric of VMI's unique methodology," *id.* at 148a. Those changes, the court believed, would stem not from the presence of women, but from the shift to coeducation: "It is not the maleness, as distinguished from femaleness, that provides justification for [VMI's] program. It is the homogeneity of gender in the process, regardless of which sex is considered, that has been shown to be related to the essence of the education and training at VMI." *Ibid.* In its view, however, "[t]he problems that could be anticipated by coeducation at VMI, which are suggested by VMI generally to arise from physiological differences between men and women, needs for privacy, and cross-sexual confrontations, would not be anticipated in an all-female program with the same mission and methodology as that of VMI." *Id.* at 150a. The court added that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women." *Id.* at 155a.

Although the court of appeals thus found a violation of the Equal Protection Clause, the court declined, "[i]n light of * * * the generally recognized benefit that VMI provides," to "order that women be admitted to VMI if alternatives are available." App. 155a. The court instead "remand[ed] the case to the district court to give to the Commonwealth the responsibility to select a course it chooses, so long as the guarantees of the Fourteenth Amendment are satisfied." *Id.* at 156a. The court stated that, consistently with its opinion,

> the Commonwealth might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its

> own policies as a private institution. While it is not ours to determine, there might be other more creative options or combinations.

Ibid.

The respondents sought review in this Court, which denied certiorari. *VMI* v. *United States*, 113 S. Ct. 2431 (1993). App. 132a-133a.

4. On remand, respondents proposed a remedial plan developed by a task force chaired by the Dean of Mary Baldwin College (MBC), a private women's liberal arts college in Staunton, Virginia. App. 8a. Although the task force observed that "some women would be suited to and interested in experiencing a 'women's VMI,' " it concluded that "aspects of VMI's military model, especially the adversative method, would not be effective for women as a group." *Ibid.* The task force proposed the creation of an all-female Virginia Women's Institute for Leadership (VWIL) offering a minor in leadership at Mary Baldwin College. See generally *id.* at 7a-11a, 101a-129a. It anticipated that VWIL would have about 25-30 students in its first year. *Id.* at 10a.

The proposed VWIL at Mary Baldwin College would have a mission similar to VMI's of producing "citizen soldiers," and the Commonwealth would provide VWIL the same amount of financial support per student as it provides to VMI. App. 8a, 10a. VWIL, however, would "not rely on the pervasive military life and adversative methods to achieve its goals," but would be addressed to "the different educational needs of most women." *Id.* at 10a. Whereas "the VMI model is based on the premise that young men come with [an] inflated sense of self-efficacy that must [be] knocked down and rebuilt," "[w]hat [women] need is a system that builds their sense of self-efficacy through meeting challenges, developing self-discipline, meeting rigor and dealing with it, and having successes." *Id.* at 10a-11a.

Instead of the "rat line," VWIL would thus have "training in self-defense and self-assertiveness through a

Cooperative Confidence Building program." App. 111a-112a. Residential life for VWIL students would also "vary significantly" from VMI. *Id.* at 66a. There would be no barracks at VWIL. VWIL students would instead live in Mary Baldwin student housing, in which privacy would be respected. *Id.* at 127a-128a.[5] VWIL freshman students would room together in separate sections of the Mary Baldwin residence halls "to facilitate the development of group identity while also encouraging good relationships and friendships with other freshmen." *Id.* at 114a. "VWIL participants will be encouraged to participate in MBC activities and class functions." *Id.* at 114a-115a. Unlike students at VMI, VWIL students would not be required to eat meals together. *Id.* at 111a.

Military training for VWIL students would be provided by the standard, pre-existing ROTC program at Mary Baldwin College. App. 109a-111a. VWIL students would also participate in a newly established, largely ceremonial Virginia Corps of Cadets. *Id.* at 9a, 110a. VWIL students would not wear uniforms except when participating in ROTC or Virginia Corps of Cadets activities. *Id.* at 111a. VWIL students would be required to participate in eight semesters of physical and health education. *Id.* at 10a, 111a.[6] Unlike VMI, Mary Baldwin College does not have a math and science focus and does not offer a Bachelor of Science degree. *Id.* at 131a. VWIL students would thus be offered a substantially different curriculum from that at VMI and, for example, would be able to obtain a Bachelor's degree in engineering only by partici-

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[5] MBC student dorms include a "wide range of living arrangements," such as "[r]esidence halls * * * elegantly equipped with brass chandeliers, plush carpeting and mahogany furniture." App. 127a. Many are converted single-family homes, furnished by the college, and each with "its own distinct character." *Ibid.* Some have "televisions, cable hook-ups and microwave ovens." *Ibid.*

[6] VWIL students would also participate in a leadership externship, participate in organizing a speaker series, and organize and carry out community projects. App. 9a.

pating in a joint program requiring three years of course work at MBC and two years at Washington University in St. Louis, Missouri. *Ibid.*[7] The athletic and physical training facilities at VMI are far more extensive and sophisticated than those at MBC. *Id.* at 130a-131a. In addition, MBC "maintains a faculty holding significantly fewer Ph.D.'s than the faculty at VMI." *Id.* at 129a.

5. The district court approved VMI's proposed remedial plan. App. 53a-131a. The court acknowledged that the proposed VWIL "differs substantially from the VMI program," *id.* at 55a; see *id.* at 12a, 67a-68a, but found the differences to be justified. The court concluded that expert witness testimony regarding "developmental and emotional differences between the sexes" supported the different educational methodologies reflected in the VWIL and the VMI programs. *Id.* at 72a; see *id.* at 62a, 76a.[8] The court accepted the conclusions of the Task Force that "a military model and, especially VMI's adversative method, would be wholly inappropriate for educating and training most women for leadership roles," and

[7] While at Washington University, VWIL students would not receive any tuition discount, and would thus be "denied the opportunity to receive an engineering degree on a publicly-supported basis like VMI students." App. 131a.

[8] The court credited research showing that "an adversative method of teaching in an all-female school would be not only inappropriate for most women, but counter-productive," because "most women reaching college generally have less confidence than men." App. 64a. Young women "do not need to have uppityness and aggression beaten out of them." *Id.* at 73a-74a. Women thus "do not need the leveling experience of a rat line and adversative methods." *Id.* at 74a n.10. Because VWIL "is planned for women who do not necessarily expect to pursue military careers," the Plan "incorporates the element of public service" instead of "the entirely militaristic experience of VMI." *Id.* at 68a. See also *id.* at 224a (because of sex-based "developmental differences," "[m]ales tend to need an atmosphere of adversativeness or ritual combat in which the teacher is a disciplinarian and a worthy competitor," while "[f]emales tend to thrive in a cooperative atmosphere in which the teacher is emotionally connected with the students").

found VWIL's cooperative method to be more appropriate for most women. *Id.* at 63a. The court predicted that the cooperative method "will produce the same or similar outcome for women that VMI produces for men." *Id.* at 64a; see *id.* at 75a-76a. The court acknowledged curricular differences between VMI and VWIL, but found those differences to be justified because "[t]he very concept of diversity precludes the Commonwealth from offering an identical curriculum at each of its colleges." *Id.* at 66a.

6. The court of appeals affirmed. App. 1a-52a. For purposes of this case, it created and applied a "special intermediate scrutiny test" with which to evaluate VMI's proposed remedy. *Id.* at 17a-18a. The court thus took a "cautious approach" to *Hogan*'s requirement that sex-based classifications be justified by exceedingly persuasive and important state objectives, *id.* at 15a, calling instead for "deference" to a State's policy "so long as the purpose is not pernicious and does not violate traditional notions of the role of government," *id.* at 18a. The court stated that respondents' purpose at the remedial stage of this case was "providing the option of a single-gender college education"; single-sex education provides "the assumed benefit that [the] students are not distracted by the presence of the other sex." *Id.* at 20a, 22a. Exclusion of women from VMI is also "directly related to achieving the results of an adversative method in a military environment." *Id.* at 23a. The adversative method "has never been tolerated in a sexually heterogeneous environment," because "[i]f we were to place men and women into the adversative relationship inherent in the VMI program, we would destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes." *Ibid.* The court acknowledged that the pedagogical value of single-sex education is disputed, but cautioned that "we should defer to a state's selection of educational techniques when we conclude, as we do here, that the purpose of providing a single-gender educa-

tion is not pernicious and falls within the range of the traditional governmental objective of providing citizens higher education." *Id.* at 21a-22a.

The court recognized that its deferential approach to *Hogan*'s first prong "effectively redirects the court's focus" to the second prong, which requires the Court to "evaluat[e] the state's means for obtaining its objective." App. 15a. The court further recognized that, if the State's goal is single-sex education, the second prong of the *Hogan* analysis effectively drops out, providing "little or no scrutiny," *id.* at 16a-17a, because exclusion of one sex is "by definition necessary for accomplishing the objective" of single-sex education, *id.* at 16a.

The court accordingly added a "third step" to the *Hogan* test, applicable only to cases in which the State's objective is to achieve "homogeneity of gender" in separate, parallel programs. App. 17a-18a. Under that third step, the court held that the benefits provided to each sex through separate programs must merely be "substantively comparable." *Id.* at 17a. The court emphasized that it was not requiring "separate but equal," *id.* at 18a n.*, or that the programs be "the same," *id.* at 17a, because "equal methods and equal results" are not required for "different classes of people," and any suggestion to the contrary "is justified only by a needless, and indeed baseless, demand for conformity," *id.* at 25a.

Applying its test, the court held that VWIL would be substantively comparable to VMI, because

> both VMI and VWIL are focused on results beyond simply awarding an undergraduate degree. Both seek to teach discipline and prepare students for leadership. The missions are similar and the goals are the same. The mechanism for achieving the goals differ—VMI utilizing an adversative and pervasive military regimen and VWIL proposing to utilize a structured environment reinforced by some military training and a concentration on leadership development—but the difference is attributable to a professional judgment of how best to produce the same opportunity.

App. 26a. The court conceded that the VWIL degree will lack the historical benefit and prestige of a VMI degree, but stated that those intangible benefits "must be the byproduct of a longer-term effort." *Id.* at 27a. The court affirmed and remanded with instructions that the district court take additional steps to assure that "a high level of state support continues" for the implementation of VWIL as planned. *Id.* at 30a.

7. Judge Phillips dissented. App. 31a-52a. He believed that under *Hogan* and *Sweatt* v. *Painter*, 339 U.S. 629 (1950), no arrangement of separate single-sex schools "could be found *substantially* related to any conceivable governmental objective unless the benefits to be separately distributed by the arrangement were *substantially* equal across the board of the relevant criteria for evaluating educational institutions." App. 48a.[9] Here, "the contrast between the two [schools] on all the relevant tangible and intangible criteria is so palpable as not to require detailed recitation. If every good thing projected for the VWIL program is realized in reasonably foreseeable time, it will necessarily be then but a pale shadow of VMI in terms of the great bulk, if not all of those criteria." *Id.* at 50a.[10]

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[9] Judge Phillips observed that the original 1839 policy of excluding women from VMI "unquestionably has been driven unchanged since its origins by a stereotyped view of the proper role and capabilities of women in society." App. 44a-45a. He thus doubted whether respondents' asserted objectives, see *id.* at 40a-41a, were their actual purposes.

[10] Judge Phillips criticized the majority for evaluating the proposed remedy from the perspective of the narrow category of women who would select VWIL primarily for its single-sex environment. App. 51a. He believed that "[t]he proper perspective from which to measure substantial equality of available benefits is that of the potential student who *could* be admitted to either school and has a choice." *Ibid.* From that perspective, it is difficult to believe that anyone "would consider the question close." *Ibid.* (quoting *Sweatt*, 339 U.S. at 634).

8. The Fourth Circuit, sua sponte, voted not to reconsider the case en banc. App. 246a-250a.[11] Judge Motz wrote a dissent from that decision, in which Judges Murnaghan and Michael joined. *Id.* at 251a-257a. She pointed out that, under *Hogan*, a state-supported single-gender program cannot be constitutionally justified "simply because it is a single-gender program," *id.* at 253a, but must be substantially related to furthering some separate goal, and the asserted goal of producing citizen-soldiers does not require a male-only admissions policy, *id.* at 253a-254a. Assuming that adversative training is desirable and essential to the VMI program, Judge Motz stated that without such training VWIL cannot be "substantively comparable" to VMI. *Id.* at 254a-255a. Conversely, if VWIL is truly "substantively comparable," the "'adversative' training must not be critical to the VMI program, and so there is nothing to prevent the abolition of 'adversative' training and admission of women to VMI." *Id.* at 255a.

Judge Motz also viewed "VMI's reputation, the opportunity to know and learn from other students, faculty, and graduates, and the ability to rely on those connections and friendships in later life" as at least as important as the course work or citizenship and military training to the opportunity denied to women. App. 255a. Finally, while many women would not want to attend VMI, it is "equally probable that many men would not want to be educated in such an environment." *Id.* at 256a-257a. The issue is not whether anyone should be forced to attend VMI, but whether women should be given the same opportunity as men to do so. *Id.* at 257a.

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[11] Six judges voted in favor of rehearing, four voted against, and three judges disqualified themselves. Under Fourth Circuit Local Rule 35(b), a case may be reheard en banc only when a majority of the active judges, including those who are disqualified, vote to rehear the case. See App. 251a n.1. A judge's disqualification thus counts as a vote against rehearing.

REASONS FOR GRANTING THE PETITION

The Commonwealth of Virginia has closed the Virginia Military Institute to women for more than 150 years. In its initial decision in this case, the court of appeals correctly found that that policy violates equal protection. In its decision affirming the district court's remedial order, however, the court of appeals fashioned a new equal protection standard in direct conflict with this Court's sex discrimination cases, and applied that standard to approve a remedy that does not provide for equal treatment. Indeed, the court's remedial decision actually compounds the original constitutional violation by invoking harmful gender stereotypes to justify offering vastly different state-supported leadership programs to women and men.

In holding that VMI's male-only admissions policy violates equal protection, the court of appeals made clear that the constitutional violation lay in denying women "the unique benefit of VMI's type of education and training," including its "unique" educational "methodology." *E.g.*, App. 152a, 155a. The court also specifically found that the VMI methodology is not "inherently unsuitable to women." *Id.* at 155a. The plan that the court has now approved, however, fails to make available to women the very opportunity to benefit from VMI's educational methodology that Virginia has unconstitutionally denied them. *Ibid.* In addition, the court of appeals' invocation of sex stereotypes to perpetuate an equal protection violation conflicts with this Court's modern sex discrimination cases. That decision thus raises questions of exceptional importance to the meaning of the Constitution's protection against discrimination on the basis of sex.[12]

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[12] The remedy approved by the court of appeals also conflicts with decisions in which this Court has repeatedly made clear that a district court is "required to tailor the scope of the remedy to fit the nature and extent of the * * * violation." *Hills* v. *Gautreaux*, 425 U.S. 284, 293 294 (1976) (internal quotation marks omitted). In other words, "[a]s with any equity case, the nature of the

1. The court of appeals assumed that state maintenance of separate single-sex schools for men and women constitutionally may be justified in appropriate circumstances. Even accepting that assumption, however, either such schools must provide educational programs that are genuinely equal or the State must justify any inequality under a standard of heightened constitutional scrutiny.[13] The court of appeals instead used a constitutional standard that requires no heightened justification for separate and *unequal* treatment. Its decision thus conflicts with *Sweatt* v. *Painter*, 339 U.S. 629 (1950), and with this Court's line of equal protection sex discrimination cases culminating in *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982), and *J.E.B.* v. *Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994).

a. The VWIL program is not equal to the military-style leadership program respondents have reserved for

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violation determines the scope of the remedy." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); see also *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1445 (1992) (judicial power is invoked "to remedy particular constitutional violations"). The remedy must be "related to the *condition* alleged to offend the Constitution" and "must be designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken* v. *Bradley*, 433 U.S. 267, 280 (1977) (internal quotation marks omitted). That is so because, under the Equal Protection Clause, "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). The remedy approved below plainly does not cure the constitutional violation that gave rise to this case—the complete exclusion of women from VMI's unique and celebrated program.

[13] This case does not require the Court to address the validity of public single-sex education generally. The remedy adopted here is not invalid merely because VMI and VWIL are single-sex schools, but because VMI has been found to be unique, because VWIL falls far short of replicating for women the educational opportunity VMI provides to men, and because the bases for creating different schools are gender-stereotyped views of the roles and capacities of women and men.

men at VMI. In *Sweatt* v. *Painter*, *supra*, this Court invalidated an assertedly "separate but equal" remedy for black students denied entry to the University of Texas Law School because the opportunities extended exclusively to whites at that school were superior to those the State afforded to blacks "[i]n terms of the number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities." 339 U.S. at 633-634. Where segregation is by sex, the presumptive requirement of equal treatment is no less applicable. See *Hogan*, 458 U.S. at 720 n.1.[14]

The court below found that VWIL will fail in many tangible ways to offer to women what VMI provides for men. See App. 7a-12a; see generally pp. 2-4, 8-10, *supra*. VWIL will, for example, lack adversative training, although that is the feature of VMI that the court and respondents repeatedly pointed to as making VMI "unique." VWIL will have no barracks life, despite the court's view that the barracks are fundamental to VMI.

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[14] The Court in *Hogan* invalidated the policy of excluding men from the Mississippi University for Women's School of Nursing. Although plaintiff there admittedly had opportunities elsewhere in the State for nursing education of the same quality as that which he was denied at MUW, 458 U.S. at 723 n.8; see *id.* at 734 (Blackmun, J., dissenting); *id.* at 735 (Powell, J., dissenting), the inconvenience to him of traveling to one of those locations made his opportunity materially unequal to those of a similarly situated woman.

This Court has not discussed the circumstances (if any) in which parallel single-sex programs for men and women might be constitutional. But in the two cases in which this Court affirmed such dual systems without opinion, the lower courts had required that the separate programs involved be essentially equal. See *Vorchheimer* v. *School Dist.*, 532 F.2d 880, 881-882, 886 (3d Cir. 1976) (plaintiff "d[id] not allege a deprivation of an education equal to that which the school board makes available to boys"), aff'd by an equally divided court, 430 U.S. 703 (1977); *Williams* v. *McNair*, 316 F. Supp. 134 (D.S.C. 1970) (finding that no special features made the women's college better than the men's college), aff'd mem., 401 U.S. 951 (1971).

The military culture of VMI will be lacking at VWIL. The Mary Baldwin campus, where the VWIL program will be situated, has only a fraction of the athletic and physical training facilities present at VMI. VWIL women would, in addition, be denied the opportunity to major in engineering at Mary Baldwin or to obtain a Bachelor of Science degree there. *Ibid.* The court of appeals thus freely acknowledged that VWIL would not offer women an educational program equal to that offered to men by VMI. App. 18a n.*; see *id.* at 24a-28a.

Perhaps even more important, VWIL would also be unequal because VMI "possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a * * * school," including "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." *Sweatt*, 339 U.S. at 634. The district court in this case correctly found that, "even if all else were equal between VMI and [VWIL], the VWIL program cannot supply those intangible qualities of history, reputation, tradition, and prestige that VMI has amassed over the years." App. 60a (footnote omitted). VMI is the nation's oldest military college, and its alumni occupy distinguished positions in private professions and public life. The program offered to women at VWIL is therefore patently unequal to the program offered to men at VMI.

b. The court of appeals' conclusion that the establishment of VWIL at Mary Baldwin would satisfy equal protection requirements, despite the substantially different programs offered by Virginia to men and to women, rests on a clearly incorrect equal protection analysis, in conflict with this Court's precedents. Expressly declining to follow *Sweatt*, the court of appeals first disavowed any requirement that the sex-segregated VWIL and VMI programs in fact be "equal," and instead demanded only that they be "substantively comparable." App. 17a-18a & n.*. That separate-but-substantively-comparable standard is satisfied, in the court's view, by unequal sex-

segregated programs that are merely "aimed at achieving similar results." *Id.* at 26a. The court then held that the requirement of substantive comparability was met by VMI and VWIL in this case because "[t]he missions are similar and the goals are the same," even though "[t]he mechanism[s] for achieving the goals differ." *Ibid.*

The separate-but-substantively-comparable standard that the court created incorrectly affirmatively incorporates and authorizes sex discrimination, rather than requiring, as it must to be consistent with this Court's decisions, an important and closely tailored justification for it. The new standard disavows the constitutional requirement of equality of treatment and instead *presumes*, without any constitutionally established justification whatsoever, that there are differences between men and women that *a priori* permit substantial differences in the programs and opportunities offered by the State to each sex. Such a standard squarely conflicts with this Court's requirement that any difference in treatment based on sex be supported by an "exceedingly persuasive justification" that exists only if the difference in treatment serves important governmental objectives and is substantially related to the achievement of those objectives. *Hogan*, 458 U.S. at 724; see also, *e.g.*, *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980); *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). Respondents failed to provide an exceedingly persuasive justification for the inequality in the treatment afforded to women. In fact, they failed to provide any acceptable justification at all.

i. The decision below instead relies on stereotypes that reflect and reinforce archaic notions about women in conflict with this Court's cases. The court of appeals approved providing women with an admittedly unequal program at VWIL on the ground that personality and preference differences between men and women justify the differences between the VMI and VWIL programs. App. 67a-76a. As a basis for its decision, the court relied on sex-based generalizations that women are more psychologically and sociologically suited than men to a confidence-

building, public-service-oriented program, while VMI's rigorous military-style training is more suitable to men. See pp. 10-11 & n.8, *supra*. The court thus embraced, among other things, the stereotyped view that women are less confident and less aggressive than men, App. 64a, 73a, and that many women "do not necessarily expect to pursue military careers," *id.* at 68a.[15]

The court of appeals' acceptance of those sex-based characterizations conflicts with *Hogan*.[16] The Court in *Hogan* invalidated a nursing school's women-only admissions policy in part because that policy "tend[ed] to perpetuate the stereotyped view of nursing as an exclusively woman's job." 458 U.S. at 729. It rejected the State's putative compensatory rationale because the admissions policy "len[t] credibility to the old view that women, not men, should become nurses, and ma[de] the assumption that nursing is a field for women a self-fulfilling prophecy." *Id.* at 730. *Hogan* thus opened to men the opportunity to enter a traditionally women's institution to train for an overwhelmingly female-dominated field. *Id.* at 723 & n.8. Just as nursing has historically been associated with women, the military has been associated with men. *J.E.B.*, 114 S. Ct. at 1429 n.16. Excluding women from VMI and providing to them an all-female alternative that is not a military school perpetu-

[15] The court's reliance on this rationale for approving a program at VWIL that is not pervasively military is particularly unjustified given the fact that most men who attend VMI similarly do not plan to pursue military careers. App. 206a, 219a.

[16] This Court in *Hogan* held that the determination whether a challenged sex-based classification is substantially related to an important governmental objective "must be applied free of fixed notions concerning the roles and abilities of males and females." 458 U.S. at 724-725. The Court there recognized that "[h]istory provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function." *Id.* at 725 n.10. Thus, "[c]are must be taken in ascertaining whether the [government's] objective itself reflects archaic and stereotypic notions." *Id.* at 725.

ates exactly the same kind of archaic, exclusive association of each sex with particular professions—here the premise that men, and not women, are fit to be military leaders.

The decision below also conflicts directly with *J.E.B.* v. *Alabama ex rel. T.B.*, *supra*. There, this Court refused to accept, as a defense of the State's use of sex-based peremptory challenges, "the very stereotype the law condemns." 114 S. Ct. at 1426. The *J.E.B.* Court reasoned that government must not "ratify and reinforce prejudicial views of the relative abilities of men and women" nor perpetuate "stereotypes [that] have wreaked injustice in so many other spheres of our country's public life." *Id.* at 1427; see also *id.* at 1424-1425 (quoting *Schlesinger* v. *Ballard*, 419 U.S. 498, 508 (1975) (disapproving "archaic and overbroad" generalizations)).[17] The particular stereotypes upon which the court below relied are, in fact, distressingly similar to Justice Bradley's discredited conclusion in *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring in the judgment), that "[t]he natural and proper timidity and delicacy which belongs to the female sex" supported the exclusion of women from the practice of law in favor of "the domestic sphere as that which properly belongs to the domain and functions of womanhood."

[17] See also *Orr* v. *Orr*, 440 U.S. 268, 283 (1979) (statute requiring payment of alimony to women but not to men carried "the baggage of sexual stereotypes"); *Califano* v. *Goldfarb*, 430 U.S. 199, 217 & n.18 (1977) (statutory distinction between widows' and widowers' social security survivors' benefits was based on "archaic and overbroad" generalizations); *Craig*, 429 U.S. at 198-199 (distinction between ages at which males and females can purchase 3.2% beer reflected "outdated misconceptions"); *Stanton* v. *Stanton*, 421 U.S. 7, 15 (1975) (statute setting different ages of majority for girls and boys relied on "role-typing society has long imposed"); see also *Bray* v. *Alexandria Women's Health Clinic*, 113 S. Ct. 753, 759 (1993) (describing as "objectively invidious" under 42 U.S.C. 1985(3) the purpose of "'saving' women *because they are women* from a combative, aggressive profession such as the practice of law").

Even where stereotypes may in part reflect current realities, the Court has condemned them both because present practices may themselves result from historical sex-based bias, and because the law must not operate to freeze men and women into socially assigned roles. The gender stereotypes upon which the court of appeals relied, like those this Court has repeatedly rejected, impermissibly "reflect and reinforce patterns of historical discrimination." *J.E.B.*, 114 S. Ct. at 1428; see also *Craig*, 429 U.S. at 202 n.14.[18] The lower court's finding that, for example, women are less aggressive than men may well reflect the effects of long-standing sex-based limitations on social roles that have often discouraged aggressive behavior in women while encouraging it in men. And, as the Court explained in *Hogan*, sex-based treatment can make the generalizations upon which it is based "self-fulfilling prophec[ies]." 458 U.S. at 730. Barring women from VMI's adversative and pervasively military-style training deprives them of any opportunity to learn to adapt to it; it thus makes women's presumed unfitness for such training, and for the leadership opportunities it

[18] The Court in *Craig* recognized that stereotypes themselves may have played a role in creating the observed statistical differences between women's and men's conduct through which the State sought to justify a law imposing different minimum ages at which men and women could purchase 3.2% beer. "The very social stereotypes that find reflection in age differential laws are likely substantially to distort the accuracy of these comparative statistics. Hence, 'reckless' young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home." 429 U.S. at 202 n.14 (citation omitted).

Similarly, in rejecting the argument in *Stanton* that a statute establishing a lower age of majority for girls than for boys was justified because boys often stay in school and require parental support for longer than girls, the Court observed that "[t]o distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed." 421 U.S. at 15.

creates, as much a "self-fulfilling prophecy" as the presumption about natural sex roles rejected in *Hogan*.[19]

ii. The decision below also conflicts sharply with numerous holdings of this Court that reliance on overbroad sex-based generalizations about women and men cannot support sex-based classifications that are applied to foreclose individual opportunity. In employing generalizations about the preferences and personalities of women and men as a basis for its decision, the court of appeals did not purport to find—nor could it possibly have found—that *all* women are less aggressive or less confident than *all* men, or that VMI's program was educationally inappropriate for *all* women. It acknowledged instead that VMI's adversative methodology is not "inherently unsuitable to women," App. 155a, and that some women would indeed be qualified for, would prefer, and would benefit from that methodology, *id.* at 76a, 155a; see *id.* at 74a, 223a, 234a. The court nonetheless acted on the premise that psychological and sociological differences between the sexes justify denying all women admission to VMI's "masculine" program as long as the VWIL "feminine" alternative program is available to them. That decision conflicts with this Court's cases prohibiting reliance on overbroad sex-based generalizations. The fact that many —perhaps most—men are not suited to VMI's educational

[19] For the reasons the Court offered in *J.E.B.*, the assumption that women have a particular psychological or sociological orientation—like the assumption that they hold particular views—also causes stigmatic harms. Women's exclusion from VMI can accurately be characterized as "practically a brand upon them, affixed by law, an assertion of their inferiority" that "denigrates the dignity" of the excluded women, and "reinvokes a history of exclusion." 114 S. Ct. at 1428 (quoting *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1880)); see also *Roberts* v. *United States Jaycees*, 468 U.S. 609, 625 (1984) (referring to "stigmatizing injury" caused by private club's exclusion of women). The fact that VMI is a celebrated institution with historic standing in the community thus makes its male-only admissions policy particularly problematic because it intensifies the stigma associated with women's exclusion.

methodology does not foreclose VMI to men who would benefit from it. There is no reason why the fact that not all women are so suited should foreclose that opportunity to women who would also benefit.[20]

This Court "has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 625 (1984). Thus, even where there are statistically significant differences between the behavior or attitudes of men and women, the Court has consistently invalidated absolute legal generalizations based on those differences as wholly incompatible with equal protection values. In *J.E.B.*, for example, the Court rejected the argument that, because sex might be an accurate predictor of jurors' attitudes, sex-based peremptory challenges were permissible. "[A] shred of truth may be contained in some stereotypes," but this Court has "made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the gen-

[20] See, *e.g.*, *J.E.B.*, 114 S. Ct. at 1429 ("gender simply may not be used as a proxy for bias"); *id.* at 1432 (O'Connor, J., concurring); *id.* at 1433-1434 (Kennedy, J., concurring in the judgment); *Hogan*, 458 U.S. at 726 (rejecting "outdated assumption that gender could be used as a 'proxy for other, more germane bases of classification' ") (quoting *Craig*, 429 U.S. at 198); *Wengler*, 446 U.S. at 151; *Orr*, 440 U.S. at 280-281, 283; *Goldfarb*, 430 U.S. at 204-207 (plurality opinion); *id.* at 219-220 (Stevens, J., concurring in the judgment); *Stanton*, 421 U.S. at 14-15; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 645 (1975); *Frontiero* v. *Richardson*, 411 U.S. 677, 686-687 (1973) (plurality opinion); *Reed* v. *Reed*, 404 U.S. 71, 76-77 (1971); but see *Bradwell*, 83 U.S. (16 Wall.) at 141-142 (Bradley, J., concuring in the judgment) (upholding sex-based exclusion of women from law practice even though the rationale for disqualifying women does not apply to all women, because "the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases").

eralization." 114 S. Ct. at 1427 n.11 (citing *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 645 (1975)).[21] As Justice O'Connor stated in her concurring opinion in *J.E.B.*, sex may as a factual matter correlate with certain attitudes, but the Equal Protection Clause deems sex, like race, "irrelevant as a matter of constitutional law" to the government's assessment of a person's attitude. 114 S. Ct. at 1432. The constitutional determination that sex does not determine attitude or personality is thus "a statement about what this Nation stands for," even where it may not be "a statement of fact." *Ibid.*

The Equal Protection Clause condemns the use of sex-based generalizations both because they deny to women who do not fit those generalizations opportunities afforded to all men (whether they fit them or not), and because it offends the most basic equal protection principles to treat women not as individuals, but only as members of a group that is conclusively presumed to lack certain capaci-

[21] See also *Craig* v. *Boren*, *supra*; *Weinberger* v. *Wiesenfeld*, *supra*; *Frontiero* v. *Richardson*, *supra*. Despite statistics in *Craig* showing that young men in the relevant age group presented greater safety risks as a result of drunk driving than did young women, 429 U.S. at 200-201, the Court struck down a law setting sex-based differential ages for beer purchase because it was not satisfied "that sex represents a legitimate, accurate proxy for the regulation of drinking and driving," *id.* at 204.

Similarly, the Court in *Weinberger* struck down a statute granting widows but not widowers social security survivors' benefits even though there was "empirical support" for the government's assertion that men are more likely than women to be the primary supporters of their spouses and children. 420 U.S. at 645.

A plurality of the Court in *Frontiero* likewise invalidated a statute presuming that spouses of male service members are dependents for purposes of benefits determinations but that spouses of female service members are not, notwithstanding that, "as an empirical matter, wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives." 411 U.S. at 688-689. Justice Brennan observed that "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." *Id.* at 686-687.

ties. As Justice Kennedy stated in his opinion concurring in the judgment in *J.E.B.*,

> [t]he neutral phrasing of the Equal Protection Clause, extending its guarantee to "any person," reveals its concern with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual rights in question). At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class.

114 S. Ct. at 1433-1434 (internal quotation marks omitted). Insofar as they are valid, respondents' concerns that many women may lack the aggressiveness and self-confidence needed to benefit from the rigors of the adversative method are appropriately addressed by making individualized determinations regarding which women are suited to that method, just as individual determinations currently are made to determine which men to admit to VMI.[22]

2. In the circumstances of this case, the only remedy consistent with equal protection principles is to admit women to VMI.[23] The VMI program has been in place for a century and a half, and VMI's students and graduates accordingly enjoy the benefits of association with an established and renowned institution with great prestige, rich traditions and exceptionally strong alumni support. Those benefits cannot now be replicated for women in a newly established program at a separate, all-female

[22] See *Orr*, 440 U.S. at 281-283 (invalidating statute under which husbands, but not wives, may be required to pay alimony because "individualized hearings at which the parties' relative financial circumstances are considered *already* occur," so that there is no reason "to use sex as a proxy for need").

[23] From the inception of this litigation, the United States has consistently sought admission of women to VMI as the appropriate remedy. See App. 54a n.2.

institution. See pp. 16-18, *supra*; App. 60a-61a. Since a new program for women cannot match VMI in those enormously important respects, the remedy this Court ordered in *Sweatt* v. *Painter*, *supra*, is also required here: admission of qualified members of the excluded class to the established school from which the State has historically excluded them. 339 U.S. at 636.

Moreover, sex segregation, which may be appropriate in some educational settings, is inappropriate here because, in the context of VMI's historical exclusion of women, the continued segregation of men and women in connection with the VMI program has powerful stigmatizing effects. Continuation of an all-male VMI must inevitably send a message that, insofar as VMI and the Commonwealth are concerned, women are incapable of coping with, or succeeding in, its program. Continued segregation also suggests that there is something inappropriate or unworkable about women and men commingling in a military or leadership setting—an implication that is particularly harmful because military service, as well as many other leadership positions, have traditionally been, but are no longer, the exclusive province of men. The history of sex discrimination in the United States has been replete with official assumptions that women and men properly belong in restrictive separate spheres and play different societal roles according to sex. This Court's equal protection jurisprudence correctly and emphatically rejects such assumptions. The exclusion of women from VMI impermissibly recognizes one such assumption—that where military-style education can be preserved in its "true" and most rigorous form, women simply do not belong.

The court of appeals concluded not only that VWIL would be better for women, but also that coeducation at VMI would be an impossibility—and thus that single-sex leadership education was required. The latter conclusion

was based on the court's determination that coeducation would

> deny those women [interested in attending VMI] the very opportunity they sought because the unique characteristics of VMI's program would be destroyed by coeducation. The Catch-22 is that women are denied the opportunity when excluded from VMI and cannot be given the opportunity by admitting them, because the change caused by their admission would destroy the opportunity.

App. 6a-7a (quoting *VMI I*, *id.* at 148a). That determination, in turn, was based in large part on the court's belief that coeducational adversative training would destroy "any sense of decency that still permeates the relationship between the sexes." *Id.* at 23a. This chain of reasoning is based entirely on a use of sex-based generalizations that is plainly prohibited under the Equal Protection Clause.[24] The valid aspects of the adversative method can be maintained and privacy and sex-specific physical differences accommodated,[25] consistent with ex-

[24] To the extent that respondents and the court view an adversative method as incompatible with coeducation because they believe it is unseemly for men to behave in a harsh and disciplining way toward women, or for women to do so toward men, App. 23a, that view itself appears to reflect notions of gender relations that cannot constitute an important state interest under this Court's equal protection jurisprudence. See, *e.g.*, *J.E.B.*, 114 S. Ct. at 1423 (criticizing decisions that affirmed sex-based classifications based on state interests in protecting women from "ugliness and depravity" and experiences that would "prove humiliating, embarrassing and degrading to a lady," or because "[r]everence for all womanhood would suffer in the public spectacle of women . . . so engaged").

[25] As it stands, not all VMI men meet VMI's demanding physical fitness requirements. The roughly 50% of new cadets, and smaller percentages of upperclassmen, who cannot pass the fitness test administered each semester do not automatically fail out, but may participate in VMI's remedial fitness program. Thus, some male students graduate from VMI still unable to pass the fitness test. See 91-1690 (*VMI I*) C.A. App. 564-566; 91-1690 (*VMI I*) Gov't C.A. Br. 11-12; App. 233a.

tending to women who wish to attend VMI the benefits of that educational program. The marginal extent, if any, to which coeducation at VMI might alter the benefits that VMI now offers exclusively to men cannot outweigh the importance of providing women access to a unique program from which they have unconstitutionally been excluded.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

COMMONWEALTH OF VIRGINIA, ET AL.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 94-1667, 94-1712

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

COMMONWEALTH OF VIRGINIA; GEORGE F. ALLEN, Governor, of the Commonwealth of Virginia; VIRGINIA MILITARY INSTITUTE; JOSEPH M. SPIVEY, III, President of the Virginia Military Institute Board of Visitors; JOHN WILLIAMS KNAPP, Superintendent of Virginia Military Institute; THE BOARD OF VISITORS OF VIRGINIA MILITARY INSTITUTE; VMI FOUNDATION, INCORPORATED; VMI ALUMNI ASSOCIATION; THE VIRGINIA STATE COUNCIL OF HIGHER EDUCATION AND ITS MEMBERS AND OFFICERS; THOMAS N. DOWNING; ELIZABETH P. HOISINGTON, Brig. Gen.; ROBERT Q. MARSTON; A COURTLAND SPOTTS, III, DANIEL F. FLOWERS; B. POWELL HARRISON, JR.; ROBERT H. SPILMAN; SAMUEL E. WOOLWINE; JAMES W. ENOCHS, JR.; WILLIAM A. HAZEL; HARVEY S. SADOW; DOUGLAS K. BAUMGARTNER; DANIEL D. CAMERON; GLEN N. JONES; JOHN W. ROBERTS, DEFENDANTS-APPELLEES

and

GORDON K. DAVIES, DEFENDANT

THE NATIONAL WOMEN'S LAW CENTER; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN CIVIL LIBERTIES UNION; CALIFORNIA WOMEN'S LAW CENTER; CENTER FOR WOMEN POLICY STUDIES; CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND; EQUAL RIGHTS ADVOCATES; FEDERALLY EMPLOYED WOMEN, INC.; FEMINIST MAJORITY FOUNDATION; HUMAN RIGHTS CAMPAIGN FUND; LAWYER'S COMMITTEE FOR CIVIL RIGHTS UNDER LAW; NATIONAL ASSOCIATION FOR GIRLS & WOMEN IN SPORT; NATIONAL ASSOCIATION OF COMMISSIONS FOR WOMEN; NATIONAL COUNCIL OF NEGRO WOMEN; NATIONAL EDUCATION ASSOCIATION; NATIONAL GAY AND LESBIAN TASK FORCE; NATIONAL HOOKUP OF BLACK WOMEN; NATIONAL ORGANIZATION FOR WOMEN; NOW LEGAL DEFENSE AND EDUCATION FUND; NATIONAL WOMEN'S CONFERENCE COMMITTEE; NATIONAL WOMEN'S PARTY; NORTHWEST WOMEN'S LAW CENTER; TRIAL LAWYERS FOR PUBLIC JUSTICE; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; YWCA OF THE U.S.A.; MARY BALDWIN COLLEGE; WELLS COLLEGE; SAINT MARY'S COLLEGE; SOUTHERN VIRGINIA COLLEGE, AMICI CURIAE

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

COMMONWEALTH OF VIRGINIA; GEORGE F. ALLEN, Governor, of the Commonwealth of Virginia; VIRGINIA MILITARY INSTITUTE; JOSEPH M. SPIVEY, III,

President of the Virginia Military Institute Board of Visitors; JOHN WILLIAMS KNAPP, Superintendent of Virginia Military Institute; THE BOARD OF VISITORS OF VIRGINIA MILITARY INSTITUTE; VMI FOUNDATION, INCORPORATED; VMI ALUMNI ASSOCIATION; THE VIRGINIA STATE COUNCIL OF HIGHER EDUCATION AND ITS MEMBERS AND OFFICERS; THOMAS N. DOWNING; ELIZABETH P. HOISINGTON, Brig. Gen.; ROBERT Q. MARSTON; A COURTLAND SPOTTS, III, DANIEL F. FLOWERS; B. POWELL HARRISON, JR.; ROBERT H. SPILMAN; SAMUEL E. WOOLWINE; JAMES W. ENOCHS, JR.; WILLIAM A. HAZEL; HARVEY S. SADOW; DOUGLAS K. BAUMGARTNER; DANIEL D. CAMERON; GLEN N. JONES; JOHN W. ROBERTS, DEFENDANTS-APPELLANTS

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ORGANIZATION FOR WOMEN; NOW LEGAL DEFENSE AND EDUCATION FUND; NATIONAL WOMEN'S CONFERENCE COMMITTEE; NATIONAL WOMEN'S PARTY; NORTHWEST WOMEN'S LAW CENTER; TRIAL LAWYERS FOR PUBLIC JUSTICE; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; YWCA OF THE U.S.A.; MARY BALDWIN COLLEGE; WELLS COLLEGE; SAINT MARY'S COLLEGE; SOUTHERN VIRGINIA COLLEGE, AMICI CURIAE

Argued Sept. 28, 1994

Decided Jan. 26, 1995

Before: NIEMEYER, Circuit Judge, PHILLIPS, Senior Circuit Judge, and WARD, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed and remanded by published opinion. Judge NIEMEYER wrote the opinion, in which Senior Judge WARD joined. Senior Judge PHILLIPS wrote a separate dissenting opinion.

OPINION

NIEMEYER, Circuit Judge:

At issue is the important question of whether a state may sponsor single-gender education without violating the Equal Protection Clause of the Fourteenth Amendment.

In *United States v. Commonwealth of Virginia, (VMI I)*, 976 F.2d 890 (4th Cir.1992), we concluded that single-gender education was "pedagogically justifiable," *id.* at 897, and the United States has acknowledged in this case that state sponsorship of single-gender education, if provided to both genders, is not per se a denial of equal protection. Even though single-gender college education yields benefits to both genders, it nevertheless has the secondary effect of excluding men from the women's college and women from the men's college, an effect that becomes yet more complicated when the programs at the two colleges differ to some degree.

We must decide now whether the Commonwealth of Virginia's proposal (1) to continue to provide a single-gender military-type college education for men at the Virginia Military Institute (VMI), (2) to provide, beginning in 1995, a single-gender education with special leadership training for women at Mary Baldwin College, and (3) to continue to provide other forms of college education, including military training, for both men and women at other colleges and universities in the state is constitutionally permissible. After applying a heightened intermediate scrutiny test specially tailored to the circumstances before us and imposing specific performance criteria on the implementation of Virginia's proposal, we affirm the district court's judgment approving the proposal.

I

VMI, established by the Commonwealth of Virginia in 1839 as a four-year military college, has a current enrollment of approximately 1,300 men. The college has always admitted only males and, through an adversative military-type training, it seeks to

graduate them as "'citizen-soldiers, educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary.'" *VMI I*, 976 F.2d at 893. In *VMI I*, we affirmed the district court's factual findings, based on studies in evidence, that such a single-gender education is pedagogically justifiable, both for males and females. We concluded:

> It is not the maleness, as distinguished from femaleness, that provides justification for the program. It is the homogeneity of gender in the process, regardless of which sex is considered, that has been shown to be related to the essence of the education and training at VMI.

Id. at 897.

We also affirmed findings of fact that coeducation would destroy aspects of VMI's program which lie near the core of its holistic system and that the admission of women therefore would deny them the very benefit they sought by their admission. The district court found that coeducation would require fundamental changes (1) to the adversative method which pits male against male because that method would not produce the same results when a male is set against a female; (2) to the absence of privacy which was found to be essential to the leveling process; and (3) to physical training, requiring VMI to adopt, as was required at the U.S. military academies, a dual-track program for men and women in order to achieve equality in effect. We concluded that coeducation at VMI would thus

> deny those women the very opportunity they sought because the unique characteristics of

> VMI's program would be destroyed by coeducation. The Catch-22 is that women are denied the opportunity when excluded from VMI and cannot be given the opportunity by admitting them, because the change caused by their admission would destroy the opportunity.

Id. at 897 (footnote omitted).

In view of these findings, we did not direct the Commonwealth of Virginia to change VMI to a coeducational college, but we did find that its failure to offer women comparable benefits constituted a violation of the Equal Protection Clause of the Fourteenth Amendment. We remanded the case to the district court, directing it to require Virginia and the other defendants to formulate, adopt, and oversee the implementation of a remedial plan. In giving Virginia the opportunity to select its course to correct the Fourteenth Amendment violations, we did not suggest any particular remedy, but allowed that Virginia might properly decide to alter the program and admit women to VMI, or establish parallel institutions or parallel programs, or abandon state support, leaving VMI the option to pursue its own policies as a private institution.

On remand, Virginia designed a proposal to implement a parallel program at Mary Baldwin College providing women with single-gender education, coupled with special leadership training. Following a trial on the appropriateness of the remedy, the district court approved the plan and directed Virginia "to proceed with all deliberate speed in implementing the Plan and to have the Plan operational for the academic year commencing in the Fall of 1995." *United States v. Commonwealth of Vir-*

ginia, 852 F.Supp. 471, 485 (W.D.Va.1994). The court retained jurisdiction to supervise implementation of the plan and required a status report every six months.

The plan approved by the district court provides for Virginia to establish with state funds the Virginia Women's Institute for Leadership (VWIL) as part of the undergraduate program at the otherwise privately funded Mary Baldwin College, a women's liberal arts college founded in 1842 in Staunton, Virginia, about 35 miles from VMI. The plan is the product of a task force, chaired by Dr. James D. Lott, Dean of Mary Baldwin College, which set as its goal the task of designing a program at Mary Baldwin College to produce "citizen-soldiers who are educated and honorable women, prepared for varied work of civil life, qualified to serve in the armed forces, imbued with love of learning, confident in the functions and attitudes of leadership, and possessing a high sense of public service." Because its mission is similar to VMI's mission, VWIL would have its students pursue the same five goals as those pursued at VMI: education, military training, mental and physical discipline, character development, and leadership development. In designing the program at Mary Baldwin College, however, the task force concluded that aspects of VMI's military model, especially the adversative method, would not be effective for women as a group, even though the task force concluded that some women would be suited to and interested in experiencing a "women's VMI." The task force concluded instead that its mission and goals could better be achieved by designing a program which deemphasized the military methods associated with the "rat line," *see VMI I*, 976 F.2d at

893, utilizing instead a structured environment emphasizing leadership training.

In addition to the standard bachelor of arts program offered at Mary Baldwin College, VWIL students would be required to complete, as a "minor," core and elective courses in leadership. A student in the VWIL program would be required to take courses in leadership communications; theories of leadership; ethics, community, and leadership; and a leadership seminar or semester of independent research on a topic relevant to women and leadership. Students would also be required to participate in Saturday seminars sponsored by upperclass students on designated subjects. Outside of the classroom, students would be required to complete a leadership externship during which they would work off campus in the public or private sector for up to one semester and to participate in a speaker series in which each VWIL class would be responsible for bringing outstanding leaders to speak on campus. Finally, all VWIL students would be required to organize and carry out community service projects.

While students at VWIL would be required to participate in four years of ROTC and in an ROTC summer camp, VWIL would not be organized under the pervasive military regimen that exists at VMI. Nevertheless, in addition to standard ROTC training, the students would conduct "leadership laboratory activities" which might incorporate aspects of military training, and they would participate in a newly-established Virginia Corps of Cadets, a uniformed military corps comprised of the all-female VWIL, the all-male VMI, and the coeducational Virginia Tech ROTC corps. The Virginia Corps of Cadets would be largely ceremonial.

Finally, VWIL students would be required to take and pass eight semesters of physical education, a portion of which would be devoted to health education courses. These programs would include athletics, physical training and a "cooperative confidence building program" to be held twice a week.

The VWIL program would be implemented at Mary Baldwin College with its faculty, although VMI faculty would conduct some ROTC training and teach some ROTC courses at Mary Baldwin College. The program would be funded by the Commonwealth of Virginia, providing a per student payment equal to the current annual appropriation paid per cadet at VMI. The program, which task force members expect would have about 25 to 30 students in the first year, would also be given a permanent endowment of $5.46 million. The out-of-pocket expenses for students to attend VWIL is expected to be no greater than those of students attending VMI, and VWIL students would be eligible for the same financial aid programs as are available to VMI cadets.

The experts for both sides acknowledge that the proposed VWIL program differs from VMI in methodology since VWIL would not rely on the pervasive military life and adversative methods to achieve its goals. Members of the task force, who are professionals in education, testified that the different approach was selected principally to address the different educational needs of most women. Dr. Heather Anne Wilson, a member of the task force, summarized the thinking, stating that "the VMI model is based on the premise that young men come with [an] inflated sense of self-efficacy that must [be] knocked down and rebuilt. . . . What [women] need is a system that builds

their sense of self-efficacy through meeting challenges, developing self-discipline, meeting rigor and dealing with it, and having successes." Mary Baldwin College, which participated actively in the design of the VWIL program, observed in its amicus brief regarding the differences between the methodology used at VMI and that proposed for VWIL:

> It would have been possible to design the VWIL program to more closely resemble VMI, with identical physical fitness standards and adversative techniques associated with the rat line. Such a program would have been easier to design and to defend against the arguments raised by the government and its amici. But it would have been a paper program, with no real prospect of successful implementation. [Mary Baldwin College] believes it would be professionally irresponsible to compromise student welfare by designing a program to meet litigation objectives instead of student needs.

While the task force did not conduct any scientific survey on demand for the proposed VWIL program, or alternatively for a women's VMI, several members expressed the opinion, based on some field data, that demand would be "significant" for VWIL but not for a women's VMI, and some expressed doubt that enough women would be interested in a women's VMI to make it work.

II

The United States contends that the remedial program offered by the Commonwealth of Virginia does not meet the requirements of the Fourteenth Amendment's Equal Protection Clause. It states that "[the

proposed remedy] does not correct the constitutional violation, *i.e.*, the denial to women of VMI's unique educational methodology. As the district court recognized, the program 'differs substantially' from the educational program offered at VMI." At oral argument the United States argued that any parallel program would have to be "identical" in substance and methodology to that of VMI. The United States maintains further that by not offering coeducation at VMI, the Commonwealth of Virginia is relying on false stereotypes and generalizations "that women are not tough enough to succeed in VMI's rigorous, military-style program." As the United States summarized its position:

> [T]he fact remains that men have [this] special educational opportunity available to them and women do not, and that as a result VMI graduates have been very successful in both public and private careers. This suit was brought on behalf of those women who want to go to VMI precisely because it is such a demanding and challenging school. The remedial plan approved by the district court does nothing for them.

The United States urges that we enter an order directing Virginia to admit women to VMI as the only remedy for correcting the past constitutional violation.

III

Equal protection of the law requires that persons similarly circumstanced be treated alike, *Reed v. Reed*, 404 U.S. 71, 76 (1971), but equal protection does not deny states the power "to treat different classes of persons in different ways." *Id.* at 75.

When the state classifies by defining a group to whom a regulation applies or a benefit is conferred, the classification " 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . .' " *Id.* at 76 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). In striking down a state statute that preferred males over females as administrators of wills in order to further governmental efficiency, the Court provided the seed for the formulation of a test utilizing an intermediate level of scrutiny for state regulations that classify by gender. While *Reed* implicitly applied a heightened level of scrutiny, the formulation of this standard came later. As this test has finally been articulated, to withstand this level of scrutiny, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Orr v. Orr*, 440 U.S. 268, 279 (1979) (internal quotations omitted); *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

In *Hogan* the Court outlined a two-step process that inquires (1) whether the state's objective is "legitimate and important," and (2) whether "the requisite direct, substantial relationship between objective and means is present." *Id.* at 725. The Court explained that tailoring the means to fit the legitimate and important purpose is necessary to assure that the classification is the product of "reasoned analysis" rather than the "mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Id.* at 725-26. In *Hogan*, the Court held unconstitutional Mississippi's women-only admissions policy of a state supported

nursing school. In doing so, the Court relied on the first prong of its articulated test, finding that the state's purported objective to "compensate[ ] for [past] discrimination against women," *id.* at 727, was in effect an effort to " 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior." *Id.* at 725. The state's purported justification, the Court observed, perpetuated an archaic and stereotyped view of women as nurses. Thus, affirmative action in favor of women based on an outdated and unsupported assertion that such protection was needed was held not to be an important governmental objective. *Cf. Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (holding that a state statute, which preserves the husband as "the head and master of the [marriage] partnership or community of gains" by providing the husband, and not the wife, with the right to unilaterally dispose of jointly held property, was not a legitimate and important state objective). The Court in *Hogan* did not decide, however, and indeed appears deliberately to have left open, the question of whether states could provide single-gender education in other circumstances. *See* 458 U.S. at 720 n. 1.

In undertaking the first step of the *Hogan* analysis to determine whether the state's objective is "legitimate and important," a court should not substitute its priorities of value over those established by the democratically chosen branch. To remain true to its constitutional role and avoid the pitfalls of a substantive evaluation of proper governmental objectives, which would amount to a "substantive equal protection analysis," a court should, at this step, deferentially consider only whether the regulation is important to a legitimate governmental purpose. The cautious approach to this first prong of intermediate scrutiny effectively redirects the court's focus on evaluating the state's means for obtaining its objective, which is the second step to the *Hogan* analysis. Giving greater scrutiny to the selection of means than to the proffered objective recognizes an appropriate deference to legislative will and at the same time assures that the legislature does not accomplish its objectives through an unequal application of the law. The substantive equal protection portion of the analysis cannot, however, be entirely diminished, for the courts can never approve a pernicious legislative purpose or one that does not comport with traditional notions of the proper role of government. The proper relative balance under this "procedural equal protection analysis" thus results in a court scrutinizing closely the procedural mechanism adopted by the legislature to accomplish its purpose and determining whether the means selected fits that purpose and bears a *direct and substantial* relationship to it. *Cf. Faulkner v. Jones*, 10 F.3d 226, 230 (4th Cir.1993) ("A regulatory classification which is made for a purpose *unrelated* to the purpose of the regulation, or which is broader than that appropriate for the regulation, may reveal prejudice and define discrimination.").

There is ample support for directing the court's attention from a substantive equal protection analysis to a more procedural analysis. In *Craig v. Boren*, 429 U.S. 190, 199-200 (1976), the Court recognized, without a significant substantive evaluation, that the protection of public health and safety, which formed the basis for Oklahoma's statutes prohibiting the sale of "3.2% beer" to males under 21 and females under

18, "represents an important function of state and local governments." But the Court found the statute unconstitutional nevertheless because the classification by gender was not shown to serve a sufficient role in achieving the state's objective. Similarly in *Reed*, the Court agreed, again without any significant substantive evaluation, that establishing an efficient probate process was a legitimate governmental objective. But it nevertheless held that selecting males over females as administrators of wills was not a means that bore a direct and substantial relationship to the state's objective. *See* 404 U.S. at 76-77. *See also Orr v. Orr*, 440 U.S. 268, 280 (1979) (readily acknowledging as legitimate the state's purpose of providing assistance to needy spouses but finding unconstitutional the means that required husbands, but not wives, to pay alimony upon divorce).

Accordingly, under the intermediate level of scrutiny of a statute or program that classifies by gender, the analysis begins with the limited inquiry into whether the state objective is both consistent with a legitimate governmental role and important in serving that role. Thereafter it must shift to an inquiry of heightened scrutiny into whether the classification "substantially and directly furthers" that objective.

Application of this traditional test, however, to a case where the classification is not directed per se at men or women, but at homogeneity of gender, presents a unique problem, because once the state's objective is found to be an important one, the classification by gender is by definition necessary for accomplishing the objective and might thereby bypass any equal protection scrutiny. The second prong of the test thus would provide little or no scrutiny of

the effect of a classification directed at homogeneity of gender. Thus, in order to measure the legitimacy of a classification based on homogeneity of gender against the Equal Protection Clause, we conclude that we must take the additional step of carefully weighing the alternatives available to members of each gender denied benefits by the classification.

To achieve the equality of treatment demanded by the Equal Protection Clause, the alternatives left available to each gender by a classification based on a homogeneity of gender need not be the same, but they must be substantively comparable so that, in the end, we cannot conclude that the value of the benefits provided by the state to one gender tends, by comparison to the benefits provided to the other, to lessen the dignity, respect, or societal regard of the other gender. We will call this third step an inquiry into the substantive comparability of the mutually exclusive programs provided to men and women.

Therefore, in this case we will examine a state-sponsored educational scheme offered by the Commonwealth of Virginia, under which the state provides a single-gender military-type college education to men and a single-gender college education with special leadership training to women, and determine (1) whether the state's objective of providing single-gender education to its citizens may be considered a legitimate and important governmental objective; (2) whether the gender classification adopted is directly and substantially related to that purpose; and (3) whether the resulting mutual exclusion of women and men from each other's institutions leaves open opportunities for those excluded to obtain substantively comparable benefits at their institution or through other means offered by the state. This is the

special intermediate scrutiny test that we shall apply in deciding this case.*

IV

Turning to Virginia's proposed VWIL program, we begin with the first part of the test and inquire into whether single-gender education constitutes a legitimate and important governmental objective, remembering that deference is to be accorded the state's legislative will so long as the purpose is not pernicious and does not violate traditional notions of the role of government.

The provision of education is considered one of the most important functions of state and local government. *See Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments."); *Stroman v. Colleton County Sch. Dist.*, 981 F.2d 152,

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* The dissenting opinion has improperly characterized this test as one for "allowable *separate-but-equal* state-supported educational institutions." This misunderstands the standard we utilize.

As a general principle of equal protection jurisprudence, when there is no *meaningful and relevant* difference between two classes of persons for purposes of a given state regulation, equality is demanded, and "separate but equal" does not fulfill the demand. When there is a difference between two classes of persons, then separate and different facilities for each class may satisfy equal protection if the difference in facilities is sufficiently related to the nature of the difference between the classes.

In this case, we do not espouse a "separate-but-equal" test and never discuss "separate-but-equal facilities." Rather, the test we utilize would allow separate and *substantively comparable* facilities where a state justifies its offering of single gender education as a legitimate governmental objective.

158 (4th Cir.1992) ("Public education is recognized as one of the most important public services offered by state government."). State and local governments routinely commit large portions of limited tax dollars to education and mandate that, through a certain educational level, attendance at school is legally required. Moreover, discussions of economic competitiveness and the root causes of social disorder commonly end in a discussion about the importance of public education.

As important as education is thought to be to the welfare of the people, it is nevertheless not a *right* secured to the people by the Constitution, *see San Antonio School District v. Rodriguez*, 411 U.S. 1, 35 (1973), and following from that reality, a citizen does not, in the absence of legislative will, have a right to demand a publicly financed education. Moreover, it is not the province of the courts to create such rights in the name of guaranteeing equal protection of the laws. *Id.* at 33.

When a state chooses to support college education, it need not provide all types of education, all disciplines, all methods, or all courses. A state with limited resources might, for example, subsidize a medical school without similarly subsidizing a law school, and its selection from among many permissible beneficial programs does not in and of itself constitute "unequal protection." When a state narrows the range of its educational offerings, a narrowing of the class of those appropriately benefited is a necessary consequence. But a state may not establish a classification for admission, for example, to a medical school *unrelated* to its purpose of providing a medical education. Thus, we would expect judicial approval of an admissions classification based on

intellectual capability, but not on race or national origin. In a similar vein, if a state were to choose to subsidize a conservatory of music, sponsoring such a benefit might not fall beyond the range of what constitutes a legitimate and important state purpose. Yet those qualified to attend would naturally be a narrowly-drawn class of persons who qualified as the best musicians. Such a classification necessarily excludes most people, yet it is substantially related to the governmental objective. On the other hand, a classification for that conservatory defined by gender would probably not qualify as an appropriate classification.

Turning to this case, providing the option of a single-gender college education may be considered a legitimate and important aspect of a public system of higher education. That single-gender education at the college level is beneficial to both sexes is a fact established in this case. *See United States v. Commonwealth of Virginia*, 766 F.Supp. 1407, 1411-12 (W.D.Va.1991). Indeed, the briefs submitted in this case by the parties and amici curiae list a multitude of professional articles describing the benefits of single-gender education, especially for late adolescents coming out of high school. This should not be surprising in light of common experience that a sex-neutral atmosphere can be less distracting to late adolescents in an educational setting where the focus is properly on matters other than relationships between the sexes. Moreover, it is not surprising that the public, increasingly seeking admission to single-gender colleges, finds this objective to be important. A recent edition of a national magazine, devoted to an annual collection of statistical data and ratings about colleges and universities, reports:

> After two decades as also-rans in higher education's rush to embrace coeducation, women's colleges are experiencing an unanticipated surge in enrollments and positive public attention.
>
> * * * * *
>
> While the disproportionate distinction achieved by women who are alumnae of single-sex institutions . . . is partially responsible for the enrollment boom, there are other explanations. Many attribute the newfound popularity to studies showing that girls in adolescence and beyond typically react to coeducational classrooms with "learned silence" and lowered aspirations. Others cite the diminished attraction of coeducation because of worrisome statistics on drinking and concerns about date rape and other violent crimes at institutions with both men and women, as well as the mounting criticism of large universities for seeming indifference to the quality of undergraduate education.

"A Burst of Popularity," *U.S. News & World Report*, Sept. 26, 1994.

Just as a state's provision of publicly financed education to its citizens is a legitimate and important governmental objective, so too is a state's opting for single-gender education as one particular pedagogical technique among many. Although there remains some disagreement among the experts about the extent of the benefits of single-gender education, it is not our role to resolve that issue. It is enough that there is a growing consensus in the professional community that a sexually homogeneous environment yields concrete educational benefits. Thus, we should defer to a state's selection of educational techniques when we

conclude, as we do here, that the purpose of providing single-gender education is not pernicious and falls within the range of the traditional governmental objective of providing citizens higher education. Accordingly, we conclude that Virginia has met the first part of our intermediate scrutiny test.

V

When applying the special intermediate scrutiny test for classifications based on homogeneity of gender in the context of higher education, we next consider whether that classification is substantially related to the state's purpose. When combined with the third part of the test, *i.e.*, the inquiry into whether excluded men and women have opportunities to obtain substantively comparable benefits, this inquiry scrutinizes the *means* by which the state chooses to obtain its objective.

Single-gender education provides an educational environment in which the student population is of one sex, providing the assumed benefit that those students are not distracted by the presence of the other sex. Even though it may be offered to both genders through separate institutions, separate campuses, or even separate classrooms, a single-gender educational program necessarily excludes members of the gender not included in *that* institution, campus, or classroom. The importance of the classification is not the fact that the student body is male or female, but that it is of the same gender, whichever is chosen for the particular program. But the only way to realize the benefits of homogeneity of gender is to limit admission to one gender. Thus, the means of classifying by gender are focused on the single-gender educational purpose as directly as the nature of the objective allows.

The classification for single-gender education at VMI is also directly related to achieving the results of an adversative method in a military environment. The adversative method was not designed to exclude women, but seized on the possibility, in a sexually homogeneous environment, of grating egos and setting the aggressiveness of one person against another through conflict, egalitarianism, lack of privacy, and stress—both physical and mental. The adversative method is intended to break down individualism and to instill the uniform values espoused by the institution. The methodology described, however, has never been tolerated in a sexually heterogeneous environment; indeed, we condemn it for good reason. If we were to place men and women into the adversative relationship inherent in the VMI program, we would destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes.

Accordingly, to preserve the benefits of single-gender education, which Virginia has chosen to attain through separate institutions, the programs at VMI and Mary Baldwin College would of necessity exclude persons of the opposite gender, men at Mary Baldwin College and women at VMI. No more direct means could be adopted to accomplish the state's objective of providing single-gender education at the institutional level. It is inherent in the benefit that men must be excluded from the women's program and women from the men's.

While we are satisfied that a classification for homogeneity of gender is necessary to provide single-gender education, at whatever level of separation, we must nevertheless, under the special intermediate scrutiny test that we are applying for such classifica-

tion, be satisfied that both excluded men and excluded women have reasonable opportunities to obtain benefits substantively comparable to those they are denied. That brings us to the final inquiry of this intermediate scrutiny test.

VI

In determining the substantive comparability of benefits, we are faced with at least two questions: how are the benefits from which one gender is excluded to be defined, and on what level and to what degree must other benefits be comparable.

The United States notes that VMI affords a unique type of military training as part of its educational program which cannot be duplicated in another institution. Even though it acknowledges that a parallel program could theoretically satisfy the requirements of the Equal Protection Clause, the United States argues that any such program must be identical to that of VMI. Because that cannot be accomplished, it concludes that women could only enjoy the unique benefits of the VMI program if VMI admits women.

The failure of the government's syllogism, however, comes from its failing to follow its logic to completion. If we ordered VMI to admit women, the program would be irrevocably altered, forever denying its unique methodology to both women and men. Changes would have to be made to the adversative method, to the absence of privacy, and to the physical requirements of the program, all of which are part of VMI's unique methodology. Certainly military training could be provided for women at VMI, but it would be substantially different from the training VMI cadets currently receive and would be closer to the pro-

grams offered by the U.S. military academies, which are already open to women. Thus, neither gender would experience the unique type of adversative military training now utilized at VMI if VMI were to become coeducational.

Moreover, the government's argument that a comparable opportunity requires an identical program is not sustained by the Equal Protection Clause. The advocation that laws require equal methods and equal results for different classes of people can no more be supported than the suggestion that two programs for two different classes of people can ever be identical. *See Reed*, 404 U.S. at 75; *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."). And the alternative of allowing a state to provide benefits only when they could be provided in identical form to all of its citizens, regardless of whether they are similarly circumstanced, is justified only by a needless, and indeed baseless, demand for conformity.

Thus, if the state desires to offer the benefits of single-gender education to its citizens, the state must mitigate the effects of the resulting gender classification by affording to both genders benefits comparable in substance, but not in form and detail.

VMI offers a publicly subsidized college education in a single-gender environment, resulting in a bachelor's degree and intended to produce disciplined men of honor who are well-suited for leadership. Its method involves the use of the traditional classroom in a pervasive military environment. The VWIL program at Mary Baldwin College would likewise intend to provide an educational opportunity in a single-

gender environment, leading to a bachelor's degree coupled with discrete training designed specifically to prepare women for leadership. In considering the level of detail for any comparison of the two programs, we must, to achieve a meaningful comparison of substance, do more than simply recognize that both programs provide higher education leading to an undergraduate degree. But we should not reject programs that are aimed at achieving similar results, not generally available from other institutions of higher learning, simply because they differ in approach. In this case, both VMI and VWIL are focused on results beyond simply awarding an undergraduate degree. Both seek to teach discipline and prepare students for leadership. The missions are similar and the goals are the same. The mechanism for achieving the goals differ—VMI utilizing an adversative and pervasive military regimen and VWIL proposing to utilize a structured environment reinforced by some military training and a concentration on leadership development—but the difference is attributable to a professional judgment of how best to provide the same opportunity.

To argue whether the adversative and pervasive military method applied to men at VMI should be applied to women at VWIL to reach better the goal of taught discipline and leadership in women makes for a rigorous debate among professional educators. The possibility of adapting the adversative methodology to women, setting woman against woman with the intended purpose of breaking individual spirit and instilling values, could succeed only if it is true that women, subjected to the same grating of mind and body, respond in the same way men do, and only

then if a sufficient number of women necessary to make such a program work desired to participate in the program. Educational experts for the Commonwealth testified that women may not respond similarly and that if the state were to establish a women's VMI-type program, the program would attract an insufficient number of participants to make the program work. The United States did not offer sufficient evidence to lead us to conclude that the Commonwealth's expert testimony was clearly erroneous in this regard. But we need not resolve such details of methodology. This is the type of ongoing debate that is to be expected among *substantively comparable* institutions, and it reveals a vitality of professional concern which can lead to institutional betterment through adjustments down the road. In this case, the mission and goals are the same, and the methodologies for attaining the goals, while different, nevertheless are reasonably calculated to succeed at each institution. Those differences that do exist do not require that the important state purpose of providing single-gender education for both sexes be defeated in this case.

It is true that VWIL is at its incipiency, and the VWIL degree from Mary Baldwin College lacks the historical benefit and prestige of a degree from VMI. But such intangible benefits can never be created on command—they must be the byproduct of a longer-term effort. Moreover, to some extent, we compensate for this deficiency in the remedy section, below. For purposes of the Equal Protection Clause, however, we are satisfied that the programs to be offered at both institutions can be substantively comparable if VWIL

is undertaken with a persistently high level of commitment by Virginia and that men and women mutually excluded by the two programs will not be denied the opportunity for an undergraduate education with discipline and special training in leadership. It is noteworthy that men and women are not limited to the choices available at these two institutions. Virginia provides a much broader array of opportunities in higher education through other state supported colleges and universities, including the coeducational military program at Virginia Polytechnic Institute and State University. *See VMI I*, 976 F.2d at 893 n. 1 & 898 n. 8.

In this case, we conclude that if the conditions that we impose below are fulfilled, the opportunities that would be open both to men and women are sufficiently comparable. We therefore are satisfied that the special intermediate scrutiny test defined for this case has been met, insofar as a *proposed* program can meet this test, by the VWIL program proposed at Mary Baldwin College.

VII

Were Virginia now building its higher educational program from the ground up and, as part of it, offering bachelor's programs (1) at a male-only institution featuring a highly disciplined military environment, (2) at a female-only institution featuring a highly disciplined leadership program in a non-military environment, and (3) at a third institution offering a broad array of subjects and methods in a coeducational environment, our analysis would end here with approval of the program against an equal protection challenge.

In this case, however, there is an added element created by the *presence now* of VMI as an ongoing and successful institution with a long history and the *absence now* of a comparable single-gender women's institution. Virginia's proposal for Mary Baldwin College is just that—a proposal. Virginia has undertaken what appears to be a serious effort at developing a plan to meet this historic deficiency. Virginia appointed a task force of professionals to design a new program, designed a program aimed at special leadership for women, and funded the proposed program at the same per capita levels at which it funds VMI. In addition, governmental officials in Virginia seem to be supporting the new program at every level. In our earlier opinion we noted some ambivalence in that regard. Then-Governor Douglas Wilder had favored coeducation at VMI in the face of no other alternative, and state education officials favored a separate program, or some other course, leading the state, as a party, to bow out of the liability phase of the litigation as a house divided. Governor Wilder is now firmly behind the VWIL program as is current Governor George Allen. Moreover, the Virginia legislature has supported the program by providing what appears to be adequate funding and by promising to increase the level of funding, should the response require it.

Nevertheless, a state's response to a court ordered correction of a Fourteenth Amendment violation is given under command and therefore must be viewed with some skepticism. While the court was assured at oral argument that the program proposed at Mary Baldwin College was serious and had the full support of the state, the important question remains whether

Virgina will implement the program with the intensity and perserverance necessary to provide a substantively comparable opportunity for women, so that when VWIL is established we will not conclude that the value of the benefits provided by that program, when compared to VMI, tends "to lessen the dignity, respect, or societal regard" of women. To allay any skepticism and assure eradication of the constitutional violation, we therefore find it essential, during the early stage of VWIL's history, to be assured affirmatively that a high level of state support continues.

Accordingly, while we affirm the judgment of the district court, which has issued an injunction mandating implementation of the plan and retaining jurisdiction to oversee the implementation, we are remanding the case with instructions that the court include, as part of its oversight of the plan's implementation, a specific review to ensure that (1) the program is headed by a well-qualified, motivated administrator, attracted by a level of compensation suited for the position; (2) the program is well-promoted to potentially qualified candidates; (3) the program includes a commitment for adequate funding by the state for the near term; and (4) the program includes a mechanism for continuing review by qualified professional educators so that its elements may be adjusted as necessary to keep the program aimed not only at providing a quality bachelor's degree but also at affording the additional element of taught discipline and leadership training for women.

AFFIRMED AND REMANDED.

PHILLIPS, Senior Circuit Judge, dissenting:

In *VMI I*, 976 F.2d 890, we held unanimously that the Commonwealth of Virginia's official policy of allowing only men to be educated at state-supported Virginia Military Institute violated the Equal Protection Clause. Specifically, we held, applying intermediate level scrutiny under developed Equal Protection jurisprudence, that if, as the Commonwealth then asserted, the "important governmental objective" its policy served was the provision for its citizens of a diverse array of educational opportunities, including single-gender education, then providing one single-gender institution for men but none for women could not be deemed "substantially related to achievement" of that objective. *Id.* at 892, 899. Furthermore, we expressed doubt that the asserted diversity-of-educational-opportunities objective could stand scrutiny as the actual reason for maintaining VMI's male-only policy. *Id.* at 899 (pointing to lack of any state-announced policy of providing single-gender education as part of overall "diversity" goal; to the failure of the Commonwealth to defend the policy in this litigation; and to the fact that the actual policy being overwhelmingly followed by the Commonwealth's colleges and universities was coeducation rather than single-gender education).

In any event, whether because the asserted governmental objective of "diversity" was not a credible reason for the policy, or because, if it were, maintaining one male-only institution in the overall system could not be deemed substantially related to such an objective, we held the policy violative of equal protection guarantees. And, in keeping with established

judicial policy where comparable forms of systemic state action have been found violative of equal protection, *see, e.g., White v. Weiser*, 412 U.S. 783, 794-95 (1973) (electoral redistricting), we remanded with directions to allow the Commonwealth to make the first attempt at remedy. *VMI I*, 976 F.2d at 900. In doing so, we noted the two obvious remedies: admitting women to VMI (going co-ed) or foregoing further state support (going private). *Id.* Additionally—and I believe prudently, if with risk—we noted the possibility, without pre-judging the validity of any effort to realize it, of establishing "parallel institutions or programs." *Id.*

The Commonwealth opted for the "parallel program" possibility as an attempted remedy and submitted to the district court the proposed plan summarized in the majority opinion. Finding it adequate if properly implemented over time to satisfy equal protection guarantees, the district court adopted it in the form of an injunctive decree that directed compliance "with all deliberate speed." 852 F.Supp. 471, 485 (W.D.Va.1994). The panel majority has now affirmed the district court's decree and the critical findings and conclusions on which it is based.

With all respect, I would not do so. I do not believe the proposed remedial plan, whose judicial adoption in unrealized form obviously does not bring Virginia into present compliance with equal protection guarantees, has any real and effectively measurable capacity to do so over foreseeable time.

I therefore dissent. I would hold that the proposed remedial plan fails, as did the policy rejected in *VMI I*, to pass equal protection muster under the appropriate intermediate level of scrutiny. Accordingly, I

would reject the plan, declare the VMI men-only policy still in violation of the Equal Protection Clause, and order that the violation be ended either by abandoning the policy or by foregoing further state support for the institution.

I

Though the legal framework is well known and the general historical background of this litigation is not in dispute, a brief summary is needed to aid in identifying the exact constitutional issue that is now before us.

When Virginia Military Institute was founded in 1839 as a state-supported military school for men only, it is inconceivable that any thought was given by the founders to the possibility that women should not be denied its intended benefits. No conscious governmental choice between alternatives therefore dictated the original men-only policy; it simply reflected the unquestioned general understanding of the time about the distinctively different roles in society of men and women. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725, n. 10 (1982) (noting numerous examples from that era of "legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function"). Since that time and until this litigation (so far as anything before us reveals) no conscious governmental choice had ever been made by the Commonwealth of Virginia to reexamine that original policy. So far as can be told, the gender-role premises of its origins were those that continued over time to sustain it as official state policy.

It is clear then that it was this litigation that prompted the Commonwealth's first official re-examination of the policy and its underlying premises in light of the Fourteenth Amendment's requirement that the states provide the equal protection of their laws to all persons subject to them. That obligation, as imposed in 1868, has from earliest times been understood by the courts to expose gender-classifications to equal protection judicial scrutiny. Early on, that scrutiny was almost completely deferential to the legislative prerogative, asking only whether the classification served any reasonably conceivable, legitimate governmental purpose. *See, e.g., Bradwell v. Illinois*, 83 U.S. (16 Wall), 130, 141 (1872) (standard applied to uphold law prohibiting women from practicing law). Since 1976, however, the Supreme Court, confirming a trend toward some degree of heightened scrutiny that started in the early 1970's, *see, e.g., Reed v. Reed*, 404 U.S. 71 (1971) (invalidating state law that preferred men over women as administrators of decedents' estates) has interpreted the Clause to require a significantly more stringent standard, "intermediate" between the "strict" scrutiny required for racial and other historically "suspect" classifications, and the most deferential "rational basis" scrutiny originally applied to gender-based classifications. As expressly adopted in *Craig v. Boren*, 429 U.S. 190 (1976), this intermediate level of scrutiny asks whether the state's gender-classification "serves important governmental objectives" and is "substantially related to achievement of those objectives," *id.* at 197. Under this standard, states seeking to uphold such classifications "carry the burden of showing an 'exceedingly persuasive justification' for [it]" by demonstrating both that the governmental objectives it asserts for the classification are "important" ones and that "the discriminatory means employed are substantially related to achievement of those objectives." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

It was this intermediate level of scrutiny that we applied in *VMI I* in holding the original male-only policy violative of equal protection. That holding still stands. Unless and until it is overruled, the original policy—which still remains in effect—remains unconstitutional. The district court's decision that we now review does not of course purport to hold otherwise. It assumes, as it must, the continuing unconstitutionality of *that* policy, but holds that the violation may be effectively remedied by the state's compliance with the injunctive decree entered by the court in adopting the state's proposed "parallel program" plan for women only at Mary Baldwin.

Several important things emerge from those developments. The first is that the remedial plan proposed by the Commonwealth and adopted as remedy by the district court simply involves a new gender-classification which now has become the proper subject of the heightened scrutiny mandated by *Craig* and its progeny. *Cf. White v. Weiser*, 412 U.S. 783, 795 (1973) (judicial review of remedial redistricting plan asks only whether plan meets constitutional requirements, not whether it provides best possible remedy for original violation).

The next point of importance is that this new gender-classification (in its projected form) is of a type that has not yet been definitively subjected to equal protection scrutiny: it involves a state's provi-

sion of separate single-gender educational institutions for men and women which it is claimed will meet equal protection requirements by providing substantially equal, though separately administered, benefits. This could raise a threshold question whether separate state-supported educational facilities for men and women, like those for white and black students, are so "inherently unequal," by reason of their stigmatic implications, *see Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954), that the new classification violates equal protection *per se* and warrants no further scrutiny.

If the answer to that threshold question is, however, "no", so that intermediate scrutiny must proceed in detail, a final point of importance about the new classification must be faced. It is that one of the two critical elements in its separate-but-equal arrangement, the women-only program at Mary Baldwin, is only a plan and not a present reality. This creates a difficult problem for Equal Protection analysis. Must we assume, without question, that the stated goals of the women's program are actually achievable and that the fact of their achievement is subject to judicial verification when it occurs, so that we should, on that assumption, (though conditionally) assess the plan in its proposed ultimate form?[1] Or may we, in intermediate scrutiny, question either or both the

[1] The district court necessarily made that assumption. Implicit in its decision is the determination that (1) if the asserted objectives of the women-only program at Mary Baldwin are achieved, the result will be a separate-but-equal provision of benefits that passes equal protection muster and (2) achievement of the objectives is a realistic possibility capable of verification by the court when it occurs.

achievability of the program's stated objectives and the ability of the courts effectively to assess their achievement? If we undertake conditional assessment of the plan on the stated assumption, what is the proper equal protection test for allowable separate-but-equal state-supported educational institutions? What is the proper measure of equality for that purpose?

Each of these inescapable problems raises for us issues of first impression in application of equal protection jurisprudence to the resolution of this case.

II

The logical first question is whether separate single-gender undergraduate educational facilities for men and women are "inherently unequal" so that the proposed plan, even if perfectly realized in time, would be *per se* violative of equal protection. *Cf. id.* The question has not been addressed by the Supreme Court, *see Hogan*, 458 U.S. at 720 n. 1, or by this court, hence is an open one. Under the disposition I believe proper, it could remain open, for I would decline to address it, and hold that even if some separate-but-equal arrangement might pass equal protection muster, the one here proposed would not.[2]

[2] The United States has expressly disclaimed any contention that any and all forms of state-supported single-gender education are *per se* violative of equal protection. *See VMI I*, 976 F.2d at 898. This position would seem compelled by the Supreme Court's recognition in *Hogan* that a single-gender educational institution *might* be justified on the basis of need to compensate the favored gender for past discrimination. 458 U.S. at 727, 728. But that is a different issue than the issue whether the provision of allegedly separate-but-equal single-gender facilities for purposes other than compensation

III

This leads to the next question: whether the particular separate-but-equal arrangement proposed by the Commonwealth and adopted by the district court can survive intermediate equal protection scrutiny.

As earlier noted, the fact that the women-only component of this arrangement exists now only in plan form presents a difficult analytical problem: whether its consummation in fact should be assumed, with scrutiny then confined to the consummated overall plan, or whether the possibility of effective, judicially verifiable consummation of the plan may itself be questioned. Because I believe that even were the VWIL proposal to be substantially consummated in foreseeable time the resulting two-component arrangement would not pass equal protection muster, I would proceed on that assumption, though with some reservations to be expressed about the practical enforceability of the injunctive decree that embodies the proposal.

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for past discrimination against one of the genders would violate equal protection *per se* because—as in matters of race—such separateness is "inherently unequal." The "question whether states can provide 'separate but equal' undergraduate institutions for males and females" was, in fact, expressly noted by the Supreme Court in *Hogan* as still an open one. *Hogan*, 458 U.S. at 720 n. 1. I do not therefore understand the United States' disclaimer to run as well to noncompensatory "separate but equal" arrangements, particularly in view of its suggestion of their necessary stigmatic implication. Appellant's Br. 20-22; Reply Br. 9, 10. For this reason, I do not think the issue whether non-compensatory "separate but equal" arrangements are *per se* violative can be avoided as waived, but, as indicated, would myself avoid it as unnecessary to decision in this case.

A

In its fully consummated form, the Commonwealth's proposed arrangement would consist of two separate single-gender undergraduate institutions, one for men only, the other for women only. The basic structure of each has been accurately summarized in the majority opinion and is not in dispute. A brief recapitulation of the core aspects suffices here.

The men-only component would be Virginia Military Institute, a justly famous and distinguished state-supported four-year liberal arts college organized and operated since 1839 in the classic "military school" model, featuring a student body now numbering around 1,300 men organized as a quasi-military "Corps of Cadets" and a distinctive "adversative" social and educational methodology designed to produce a distinctive type of "citizen-soldier" particularly suited for military and civic leadership.

The women-only component would be the Virginia Women's Institute for Leadership (VWIL) operated under contract with, and funded by, the Commonwealth of Virginia, as part of the undergraduate program at the otherwise privately-funded Mary Baldwin College. This "Institute," whose essential structure and stated mission are accurately summarized in the majority opinion, *ante* at 1233-35, would have come into existence in the Fall of 1995 at the earliest, around a century and a half after VMI's founding. While its future enrollment is necessarily uncertain, it would be expected to start up with about 25 to 30 students and expand as a concededly problematic demand for its highly specialized program allowed.

As indicated, for purposes of decision here, I would lay aside all concerns about whether the VWIL program would actually ever work out substantially as proposed, assume that it would be, and subject the resulting two-component arrangement to intermediate level equal protection scrutiny. That is, I would ask whether the resulting provision of separate state-supported men-only and women-only educational opportunities at VMI and VWIL respectively could meet that standard.

B

The first step in that process is to identify the precise governmental objective(s) the Commonwealth asserts to be the "important" one(s) justifying the proposed double gender-classification under which women will continue to be denied admission to VMI and men to VWIL. For in intermediate level scrutiny, unlike rational-basis scrutiny, we are limited to consideration of the objectives specifically advanced by the state, and may not look beyond those to any our imaginations might seize upon as justification. *See* L. Tribe, *American Constitutional Law*, § 16-32, pp. 1604-06 (2d ed.1988).

Though usually the governmental objectives relied upon to justify gender (and other) classifications are plainly enough articulated by their state defenders, that is not so true here. There is a real problem of identification in this case, for the Commonwealth seems uncertainly to advance a number as alternative or cumulative free-standing possibilities. Three might be identified: (1) providing separate single-gender educational facilities for both men and women because of the intrinsic value to some in both genders of such a social environment for education ("intrinsic value");[3] (2) producing both men and women particularly suited for leadership roles as "citizen-soldiers" by providing separate single-gender educational programs for each that are designed to accommodate their different psychological and emotional strengths and weaknesses in becoming effective leaders in either domain ("gender-adapted leadership training");[4] and (3) providing separate single-gender educational facilities for men and women as part of an overall objective of providing a diverse array of state-supported higher-education opportunities ("system-diversity").[5]

If these be, alternatively or together, the "governmental objectives" now asserted by the Commonwealth, we are entitled at the outset to inquire as to whether they are the "actual purposes," and to reject them if the record draws their reality as the true motivations for the policy sufficiently in doubt.[6] This was exactly what the Supreme Court did in rejecting the State of Mississippi's assertion in *Hogan* that its primary objective in maintaining its School of Nursing for women only was to compensate for past discrimination against them. Looking to the history of the School's founding and subsequent operation, to statistics respecting the actual dominance of women in the nursing profession throughout that history,

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[3] Appellees' Br. at 4, 5.

[4] *Id.* at 2-4, 32-37.

[5] *Id.* at 14 & n. 5.

[6] Such an inquiry logically precedes inquiry into the "importance" of any objectives accepted as reflective of "actual purpose." *See Hogan*, 458 U.S. at 730. As to how the "importance" inquiry would work out in this case, *see infra*, at 1248 & n. 8.

and to state legislative history, the Court concluded that "although the state recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification." *Hogan*, 458 U.S. at 730. The real purpose behind the original policy and its continuation through history was implicitly recognized by the *Hogan* court as being simply the carrying through of a "stereotyped view of nursing as an exclusively women's job." *Id.* at 729. *See also Califano v. Goldfarb*, 430 U.S. 199, 212-17 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975) (noting that "the mere recitation of a benign compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme").

I believe that a comparable inquiry here could properly support a like rejection of the various governmental objectives suggested by the Commonwealth —on the basis that they demonstrably are rationalizations compelled by the exigencies of this litigation rather than the actual overriding purpose of the proposed separate-but-equal arrangement. Such an inquiry—looking realistically to the historical record, taking judicial notice of much of relevance that is known to the whole world and of which we are not compelled to feign ignorance, *see Watts v. Indiana*, 338 U.S. 49, 52 (1948), and holding the Commonwealth to its appropriate stringent burden of justification, *see Hogan*, 458 U.S. at 724 (must be "exceedingly persuasive") would, I believe, reveal a quite different *actual* purpose. Specifically, I think it would support a confident and fair conclusion that the primary, overriding purpose is not to create a new type of educational opportunity for women, nor

to broaden the Commonwealth's educational base for producing a special kind of citizen-soldier leadership, nor to further diversify the Commonwealth's higher education system—though all of these might result serendipitously from the arrangement—but is simply by this means to allow VMI to continue to exclude women in order to preserve its historic character and mission as that is perceived and has been primarily defined in this litigation by VMI and directly affiliated parties.[7]

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[7] As the record indicates, and as it is well to recall at this stage of the litigation, the Commonwealth of Virginia did not officially defend the original VMI men-only policy that we held to be unconstitutional in *VMI I*. The justification for that policy advanced in *VMI I* was exclusively shaped and actively conducted by VMI, its official governing board, that board's members and (as intervenors) VMI alumni organizations. *See VMI I*, 976 F.2d at 894 & n. 3. The justification then advanced by those parties is fairly and simply summarized:

> VMI's distinctive educational program, featuring rigorous military discipline and an "adversative" methodology, is suitable only for men and not for women, to the point that the admission of any women into it would effectively destroy it; the demonstrated value to society of that program and those it has produced is too important to allow it to be destroyed in that way.

See VMI I, 976 F.2d at 896-97.

That justification and the perception underlying it has not been abandoned by those who advanced it. They continue to press it by "protective" cross-appeal on this appeal after having sought to challenge its rejection in the Supreme Court.

Taking judicial notice of matters surely of common knowledge in the Commonwealth, I would be prepared to conclude that (1) the perception underlying the policy justification advanced by VMI officials and alumni organizations remains alive and strongly held by those parties, and that (2) the

To reach such a conclusion would no more question the good faith of the Commonwealth in advancing these claimed governmental objectives in this litigation than did the Supreme Court's rejection of the objectives advanced by Mississippi in the *Hogan* litigation. It would simply involve the same realistic recognition that the objectives advanced represent after-the-fact rationalizations that, quite understandably, may be advanced by any state required in litigation to justify a gender-classification whose seeds were planted long before equal protection jurisprudence had come into being or had evolved to the point of drawing it in question. *Cf. Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 653 (1974) (Powell, J., concurring in result) (urging analysis of mandatory pregnancy leave policy under equal protection doctrine, and rejecting under such an analysis "most of the after-the-fact rationalizations proposed by the [state agency defendant]" as "unsupported by the record").

A conclusion that the actual, overriding purpose of the proposed separate-but-equal arrangement remains the preservation by that means of the original 1839 policy of excluding women from VMI, a policy that unquestionably has been driven unchanged since its origins by a stereotyped view of the proper role and

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prestige and influence of VMI and its justly loyal alumni and their organization in influencing any political decision affecting VMI's interests is sufficiently powerful to ensure that their overriding purpose in this matter effectively defines the actual governmental objective of the Commonwealth's proposed remedial plan. That overriding purpose remains the preservation of VMI as a state-supported educational institution for men only, with all other asserted purposes of the plan merely secondary means to that end.

capabilities of women in society, would of course require declaring the proposed arrangement violative of equal protection without further inquiry into specifics. *See Hogan*, 458 U.S. at 729, 730.

Although, as indicated, I believe a decision on that ground would be proper, I would not decide the case on that basis alone, or even primarily. There are unique circumstances here that were not present in *Hogan* or in any other case of which I am aware in which a state's asserted objectives have been rejected at the threshold as demonstrably not the "actual purpose" of a challenged gender-classification. Uniquely, the gender-classification under specific challenge here is one now defended by the Commonwealth as a proposed judicially required remedy for a so-far unsuccessfully defended prior gender-classification. The real position of those who defended the original policy remains that the Commonwealth should not have been required to undertake any remedial action, hence that it need have no justifying objectives for the new remedial gender-classification it proposes. *See supra*, note 7. Though the Commonwealth does not press the point, I think it fair to recognize that in these circumstances, unlike those where the gender-classification being defended is one prompted entirely by voluntary state action, courts should be especially cautious about rejecting as not "actual" the objectives advanced for involuntarily undertaken remedial action. Accordingly, though I believe the Commonwealth must defend its remedial plan under the usual intermediate scrutiny standard, I think it is entitled to have its proposed separate-but-equal gender-classification assessed for the substantiality of its "fit" to the remedial objectives it now asserts.

C

Assuming then for purposes of this case that the governmental objectives earlier identified should be accepted as reflective of the "actual purposes" of the proposed plan despite my stated doubts about their reality as other than compelled remedial rationalizations, the next question is whether they have also been shown to be "important" and not merely "rational." Here again, because of the conceptual difficulties presented by the remedial context of the case, I would assume *arguendo*[8] the importance of the governmental objectives asserted by the Commonwealth and proceed to the second inquiry under the proper equal protection test: whether the Commonwealth has made an "exceedingly persuasive" showing that the gender-classification central to its proposed separate-but-equal arrangement is "substantially and directly related to its proposed [remedial] objectives." *Hogan*, 458 U.S. at 724, 730. I would

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[8] I make the assumption *arguendo* because resolution of the special conceptual problems respecting remedial objectives in intermediate-level scrutiny that would be required is not necessary to the decision I would reach. In making the assumption, I note, with all respect, that I do not agree with the majority's assertion that when we do assess "importance" we owe great deference to legislative judgments on the matter. I believe instead that in intermediate scrutiny the state's burden of showing the "importance" of asserted objectives is, as with all aspects of its justification defense, a difficult one that provokes non-deferential judicial balancing of the objectives asserted against affected private interests. *See, e.g., Craig*, 429 U.S. 190, 196 (1976) (asserted governmental objective of administrative convenience not sufficiently "important" to justify gender-classification being challenged; no deference accorded legislative judgment).

hold not, as the primary ground for decision that the proposed plan does not pass constitutional muster.

What is the "substantial and direct relationship" —the "fit"—between means and asserted ends for which we search in intermediate scrutiny, and how do we look for it—in general, and particularly in this case? The general question whether a challenged classification "is *substantially* related to its asserted goals" has been characterized as "at best an opaque one." *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 474, n. 10 (1981) (plurality opinion) (emphasis in original). Though as this rightly observes, the substantive inquiry is likely to be difficult, two critical aspects of the inquiry process are plain enough.

1. The inquiry is one of law—of constitutional law—so that review of a lower court's determination of the issue, (though not of any underlying factual predicates) is plenary. *See, e.g., Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150-52 (1980) (plenary review of State Supreme Court holding).

2. The requirement that the relationship between discriminatory means and asserted goals be "substantial and direct," rather than merely "rational for any conceivable purpose," mandates an inquiry into available alternatives, including gender-neutral ones. This is not to determine whether the fit is the best one possible, but to ensure that the means chosen did not by-pass reasonably available alternatives less discriminatory or not at all discriminatory in their impact on the disfavored gender. *See, e.g., Wengler*, 446 U.S. 142, 151 (1980); *Orr v. Orr*, 440 U.S. 268, 283 (1979).

The specific issue thus becomes whether the Commonwealth has sufficiently shown within these prin-

ciples, that its proposed separate single-gender school arrangement is directly and substantially related to the achievement of the three governmental objectives earlier identified in short-form as the "intrinsic value," "gender-adapted leadership training," and "system-diversity" objectives. *Supra* at [40a-41a].

As earlier indicated, the question of the fitness of any such separate single-gender school arrangement to achieve any governmental objective apparently is one of first impression in contemporary equal protection jurisprudence. One aspect of the matter, however, seems clear at the outset to me: no such arrangement could be found *substantially* related to any conceivable governmental objective unless the benefits to be separately distributed by the arrangement were *substantially* equal across the board of the relevant criteria for evaluating educational institutions. The Supreme Court's reference, in *dicta*, to the possibility of such an arrangement in *Hogan* seems to assume such an equality of benefits as a given, *see Hogan*, 458 U.S. at 720 n. 1, and I do not see how it could be otherwise under contemporary equal protection jurisprudence. Certainly, when separate-but-equal educational arrangements for the races were considered to be tolerable under the Equal Protection Clause, a basic prerequisite was that they be truly, *substantially* equal in all the relevant criteria, tangible and intangible, by which educational institutions are evaluated. *See e.g., Sweatt v. Painter*, 339 U.S. 629, 633-34 (1950) (requiring "substantial equality in educational opportunities" to justify separate state-supported law schools for white and black students, and not finding it upon considering both tangible resources such as "scope of library" and intangible resources such as "position and influence of the alumni," "traditions and prestige").

Though race is a "suspect" classification and gender so far is not, I see no reason why the same requirement of *substantial* equality of benefits that was thought at one time to justify separate-but-equal schools for the different races should not apply to separate schools for men and women if that classification now does, as race formerly but no longer does, permit separate-but-equal arrangements. If that be so, then no governmental objective whose achievement is specifically dependent upon the utilization of separate single-gender institutions to distribute educational benefits could possibly justify a significant discrimination between the two in terms of the basic content, or quality, or quantity of those benefits—tangible and intangible. Thus, I would think a state could not justify under intermediate scrutiny the provision of a men-only engineering school and a women-only nursing school as a means of achieving such asserted objectives as system-diversity, or the intrinsic value to some in each gender of single-gender educational environments, or the like. Neither could it justify the provision of separate graduate or undergraduate institutions having comparable educational programs and missions, but also having wide disparities favoring one gender over the other in matters of physical plant, annual funding, faculty or like commonly understood measures of value.

Does this mean that there is no way that a state constitutionally could set about achieving such governmental objectives through the provision of separate single-gender institutions? I think it does not necessarily mean that, but the arguably acceptable means would seem to me to be very narrowly circumscribed.

If we looked for the arrangement most likely to survive scrutiny, it presumably would involve simultaneously opened single-gender undergraduate institutions having substantially comparable curricular and extracurricular programs, funding, physical plant, administration and support services, and faculty and library resources. Such an arrangement would involve no gender-line discrimination in terms of tangible benefits, nor of intangible benefits such as tradition, prestige and alumni influence—as to which each starts with none. Nor could there be any stigmatic implications arising from the substantially comparable content of its educational program. If any arrangement involving separate-but-equal single-gender institutions set in place to achieve governmental objectives of system-diversity, or of accommodating valid preferences in each gender for a single-gender educational environment, could survive equal protection scrutiny, it surely would be one such as that posited.

Taking it as the paradigm against which to measure the proposed arrangement reveals how far short the proposed plan falls from providing substantially equal tangible and intangible educational benefits to men and women. Without denigrating in any way the proposed VWIL program, not certainly Mary Baldwin, the contrast between the two on all the relevant tangible and intangible criteria is so palpable as not to require detailed recitation. If every good thing projected for the VWIL program is realized in reasonably foreseeable time, it will necessarily be then but a pale shadow of VMI in terms of the great bulk, if not all of those criteria. Particularly is this obvious with respect to the intangibles such as prestige, tradition and alumni influence which the Supreme

Court, looking for substantial equality of educational opportunities in *Sweatt*, thought "more important" even than tangible resources. 339 U.S. at 634. The student and eventual graduate of VWIL will not be able to call on the prestigious name of "VMI" in seeking employment or preference in her various endeavors; the powerful political and economic ties of the VMI alumni network cannot be expected to open for her; the prestige and tradition of her own fledgling institution cannot possibly ever achieve even rough parity with those of VMI. The catch-up game is an impossible one, as any honest reflection upon the matter must reveal.

The district court and the majority apparently seek to avoid the insurmountable problem of finding substantial equality of benefits by narrowly defining the relevant range of those to be considered. If inquiry is confined only to those benefits sought by those relatively few women who are expected to self-select VWIL primarily for its single-gender environment, it becomes very easy to ascribe not only substantial equality, but superiority, to the benefits available at VWIL. But that, of course, won't do. The proper perspective from which to measure substantial equality of available benefits is that of the potential student who *could* be admitted to either school and has a choice. As was said in *Sweatt*, "[i]t is difficult to believe that one who had a free choice between [these] schools would consider the question close." *Id.*

The implication of all this is, as I realize, a stark one. No separate single-gender arrangement that involved VMI as the all-men's school and any newly-founded *separate* institution (whether free-standing or an appendage) as the all womens' component could

pass equal protection muster. It could not provide substantially equal educational benefits or opportunities to both genders.

This may be most obvious when the proposed arrangement is tested for fit against the "system-diversity" and "intrinsic value" objectives. The "gender-adopted leadership training" objective poses a slightly different problem. The benefit upon which it concentrates is a projected *outcome*: that of being one especially suited for military and civilian leadership by virtue of training adapted to different gender-characteristics, as "citizen-soldier."

As to this particular objective, I will close by noting a process reservation beyond the substantive concerns for achieving substantial equality of the outcome goal. It seems to me too amorphous an objective to permit any principled judicial assessment as the VWIL program is expected to evolve. When can it first be assessed? Surely not earlier than the four years it will take to produce the first graduate presumably trained for that special leadership role. Must it not actually await an additional period for putting the training to test in the military and civilian domains? How will it be assessed even then: by comparing, on a proportional basis, the actual leadership positions achieved by graduates of the two schools? My pessimistic assessment is that one of two things will occur. One, this particular governmental objective—actually a critical one as advanced—will simply be allowed to fall out of sight in the judicial monitoring of results that is projected. Two, its attempted monitoring will generate an absolute quagmire of conflicting contentions about achievement of the objective.

It will not work.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civ. A. No. 90-0126-R

UNITED STATES OF AMERICA, PLAINTIFF

v.

COMMONWEALTH OF VIRGINIA, ET AL., DEFENDANTS

Apr. 29, 1994

MEMORANDUM OPINION [1]

KISER, Chief Judge.

This phase of this case ("Remedy") is on remand from the Fourth Circuit. Although the Fourth Circuit agreed that single-sex education was a legitimate pedagogical goal, it criticized the Commonwealth's avowed policy of supporting diversity in higher education through VMI in two respects: First, that there had been no authoritative articulation that the Commonwealth sought to diversify its higher education

[1] Additional findings of fact are set forth in the Appendix to this Memorandum Opinion.

system by offering single-sex education; and, second, that the program—as it now stands—is one-sided, i.e. that VMI offers a single-sex opportunity to young men while there is no comparable opportunity for young women. For these reasons, this case was remanded to this Court to permit the Commonwealth to ". . . formulate, adopt and implement a plan that conforms to the principles of equal protection. . . ." *United States v. Commonwealth of Virginia*, 976 F.2d 890, 892 (4th Cir.1992) (*"VMI"*).

There is substantial disagreement between the parties as to what is required by the remanding instructions of the Fourth Circuit and the Equal Protection Clause. It is the position of the United States that the mandate from the Fourth Circuit and the Equal Protection Clause require that if the Commonwealth opts to establish a separate program for young women, it must be in all respects equivalent to, i.e. a mirror image of, the VMI program.[2] The Commonwealth argues that the United States' position mis-

[2] The United States continues to maintain that the only action by the Commonwealth which will comport with the Equal Protection Clause is to admit women to VMI. This was the remedy the United States sought in its Complaint, and it has never wavered from it. The United States called the Court's attention to the recent decision in *J.E.B. v. Alabama*, —— U.S. ——, 114 S.Ct. 1419, —— L.Ed.2d —— (1994). This case does not change the equal protection jurisprudence applicable to the intermediate scrutiny test as applied to sex-based classifications. The Court, in its plurality opinion, reaffirmed the test as set forth in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982). The Court found the respondent had failed to meet the first prong of the test, i.e., that sex-based peremptory challenges are not an important governmental objective.

construes both the meaning of the Fourth Circuit's mandate and the requirements of the Equal Protection Clause. The Commonwealth's position is that the mandate of the Fourth Circuit requires Virginia to provide a state-supported all-female college program that will attain an outcome for women that is comparable to that received by young men upon graduation from VMI. The Commonwealth argues that to attain the desired outcome for women, the Fourth Circuit's mandate does not require that an all-female program adopt the same or similar methodology as is used at VMI. The Commonwealth further argues that its view comports with the judicial gloss given, in this context, to the Equal Protection Clause—i.e. that the Commonwealth's system of higher education now satisfies intermediate scrutiny equal protection analysis applicable to sex-based discrimination.

If the United States' position is the correct one, then the Commonwealth's proposed Plan must fail because the Plan differs substantially from the VMI program. If the Commonwealth's position is the correct one, however, then an analysis of its proposed plan is necessary to determine whether it meets both the requirements of the Fourth Circuit's mandate and the requirements of the Equal Protection Clause. I am persuaded that the Commonwealth's position is the correct one and that its proposed plan meets the requirements of the Fourth Circuit's mandate and the requirements of the Equal Protection Clause. Here is why.

Procedural Background

At the outset of this phase of the litigation, this Court ruled that factual findings, which were made by this court in the liability phase and approved by

the Fourth Circuit, would not be open for reexamination. A full recitation of those facts is found in this Court's opinion at 766 F.Supp. 1407. A brief recitation of the operative findings made there will be sufficient for the present purposes.

District Court Opinion

After reviewing the legal principles that apply to intermediate scrutiny under the Equal Protection Clause, I reviewed the expert testimony pertaining to the benefits of a single-sex education and concluded that "viewed in the light of this very substantial authority favoring single-sex education, the VMI board's decision to maintain an all-male institution is fully justified even without taking into consideration the other unique features of VMI's method of teaching and training." *Id.* at 1412. After making that finding, I then reviewed the effect that the admission of women to VMI would have on its program and concluded "the single-sex status would be lost and some aspects of the distinctive method would be altered if it were to admit women." *Id.* at 1413. Finally, I observed that there was an absence of a comparable opportunity for women, but concluded that this did not impair the legitimacy of the VMI program, and I did not seek to impose corrective action upon the Commonwealth because "the relief that the United States seeks in this suit is to require VMI to open its doors to women—not to force Virginia to establish an all-female, state supported college." *Id.* at 1414.

Fourth Circuit Opinion

At the outset of its opinion, the Fourth Circuit stated,

> [W]e accept the district court's factual determination that VMI's unique methodology justifies a single-sex policy and material aspects of its essentially holistic system would be substantially changed by coeducation. . . . The Commonwealth of Virginia has not, however, advanced any state policy by which it can justify its determination, under an announced policy of diversity, to afford VMI's unique type of program to men and not to women.

p. 892.

The court stated that it was remanding the case "to the district court to require the Commonwealth of Virginia to formulate, adopt, and implement a plan that conforms to the principles of equal protection discussed herein." *Id.* at 892. The court then proceeded with its analysis. After reviewing this Court's finding with regard to the benefits of single-sex education in general—and VMI methodology in particular —and after reviewing the pertinent jurisprudence with regard to the proper application of equal protection under the intermediate scrutiny test, the court concluded, "In summary, the record supports the conclusion that single-sex education is pedagogically justifiable, and VMI's system, which the district court found to include a holistic formula of training, even more so." *Id.* at 898.

The appeals court proceeded to criticize the Commonwealth for failing to articulate, authoritatively and comprehensively, a policy with regard to single-sex education which would include both males and females. In summation, the Court stated:

> We are thus left with three conclusions: (1) single-sex education, and VMI's program in particular, is justified by a legitimate and relevant institutional mission which favors neither sex; (2) the introduction of women at VMI will materially alter the very program in which women seek to partake; and (3) the Commonwealth of Virginia, despite its announced policy of diversity, has failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type of education to men and not to women.

Id. at 899.

Because of these deficiencies, the Fourth Circuit remanded the case to this Court to give the Commonwealth an opportunity to fashion a remedy that would address the constitutional violation identified by the Court. In so doing, the Court instructed:

> [W]e do not mean to suggest the specific remedial course that the Commonwealth should or must follow hereafter. Rather, we remand the case to the district court to give the Commonwealth the responsibility to select a course it chooses, so long as the guarantees of the Fourteenth Amendment are satisfied. Consistent therewith, the Commonwealth might properly decide to admit women to VMI and to adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI leaving VMI the option to pursue its own policies as a private institution. While it is not ours to determine,

> there might be other more creative options or combinations."

Id. at 900.

Interpreting the Fourth Circuit's Opinion

The overarching question in this phase of the litigation is: what does the Fourth Circuit's opinion require of a proposed plan in order to pass constitutional muster? As stated above, the litigants disagree strongly on this issue. Both sides are able to support their arguments by fragmented readings of the Fourth Circuit's opinion. For example, the United States finds support in the statement "whether the unique benefit offered by VMI's type of education can be denied to women by the state under a policy of diversity. . . ." *VMI*, 976 F.2d at 898. This statement would imply that a program for women must provide a VMI-type education. The United States urges that to comply with the instructions of the Fourth Circuit, the Commonwealth is required to produce a plan that will create a separate institution which closely resembles, if not clones, the physical plant, the curriculum, the methodology, the prestige, and many of the other attributes of VMI. In other words, the United States reads the Fourth Circuit opinion to require a "separate but equal" institution.[3]

The sophistry of the "separate but equal" concept was roundly rejected in *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950). *Sweatt* involved an equal protection challenge to the admissions policy at the University of Texas law school

[3] The United States does not use the phrase "separate but equal" but that is the import of its argument.

which categorically denied admission to blacks. Texas offered a newly established all-negro law school which it claimed remedied any constitutional violation which may have existed by virtue of UT's law school admissions policy. Although *Sweatt* was a racial discrimination case that applied strict scrutiny equal protection analysis, the rationale of the case applies to this case. The *Sweatt* Court, after reviewing the tangible qualities which made the University of Texas superior to the proposed new law school for negroes, stated:

> What is more important, the University of Texas law school possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.

Id. at 634, 70 S.Ct at 850.

Thus, if "separate but equal" is the standard by which the Commonwealth's plan must be measured, then it surely must fail because, as the United States pointed out time and time again during the trial, even if all else were equal between VMI and the Virginia Women's Institute for Leadership [4] ("VWIL"), the VWIL program cannot supply those intangible qualities of history, reputation, tradition, and prestige that VMI has amassed over the years. One must

[4] This is the title assigned to the Commonwealth's Proposed Remedial Plan.

assume that the Fourth Circuit did not assign the Commonwealth an impossible task when it suggested that the Commonwealth was free to establish "parallel programs" or to devise "creative options or combinations" that would comply with the court's decision. It would be unrealistic to think that the Fourth Circuit was requiring an exercise in futility.

Moreover, the Fourth Circuit's opinion must be read in light of the portions of the district court findings, which the appeals court approved. The district court found VMI's male-only admission policy was justified without regard to VMI's unique methods of teaching and training. The Fourth Circuit's opinion approved specifically the district court findings in this respect when it stated, "the record supports the conclusion that single-sex education is pedagogically justifiable, and VMI's system, which the district court found to include a holistic formula of training, even more so." *Id.* at 898. Thus, both the district court and the appeals court held that the legal justification for VMI's all-male admission policy was contained in the benefits that flow from a single-sex education. The finding that VMI employed unique methods to teach young men was simply an added dimension to the already pedagogically justifiable policy.

The Fourth Circuit's subsequent decision in *Faulkner v. Jones*, 10 F.3d 226 (4th Cir.1993), further bears out this interpretation of its mandate in this case. In amplifying its decision in the VMI case, the *Faulkner* court stated,

> We remanded the case to the district court with instructions to elicit a plan from the state complying with the Fourteenth Amendment. We allowed for the possibility that a plan could still

permit VMI to remain a state-supported, single-sex institution, if that were the will of Virginia, so long as women were offered a parallel program. (citations omitted). The order in VMI did not, however, direct that any parallel program which the state might choose to provide be identical for both men and women.

* * * *

[A]ny analysis of [a parallel program] in response to a justified purpose must take into account the nature of the difference on which the separation is based, the relevant benefits to the needs of each gender, the demand (both in terms of quality and quantity), and any other relevant factor. In the end, distinctions in any separate facilities provided for males and females may be based on real differences between the sexes, both in quality and quantity, so long as the distinctions are not based on stereotyped or generalized perceptions of differences.

Id. at 232.

I now examine the Commonwealth's Proposed Remedial Plan to determine whether it comports with the controlling legal principles framed by the Fourth Circuit's remand.

Virginia Women's Institute for Leadership

The Virginia Women's Institute for Leadership ("VWIL") plan envisions a parallel program, which takes into account the differences and the needs of college-age men and women. The VWIL plan offers a holistic, residential four-year college experience in

an established all-female environment, Mary Baldwin College (MBC). VWIL's stated mission is to produce the "citizen soldier," i.e., women who are trained for leadership in both civilian and military life. Defs.' Ex. 11 at 6. The methods by which this goal could be achieved were the subject of intensive study and planning by professionals who are leaders in the field of designing and implementing educational programs for women.

The Dean of Mary Baldwin College ("MBC"), Dr. James D. Lott, chairs a Task Force which was charged with developing a leadership program suitable for an all-female four-year college. Dr. Lott is an expert in the field of educating women at the college level, as were most of the members of the Task Force who were drawn from the staff and faculty at MBC. Besides drawing on their own experience and expertise, the Task Force made an in-depth study of the published literature on the developmental psychology of women and the cognitive development of women. The Task Force also consulted outside experts, the most notable of which was Dr. Richard C. Richardson, Jr. After a detailed study of the appropriate methods by which the leadership program should be structured, the Task Force determined that a military model and, especially VMI's adversative method, would be wholly inappropriate for educating and training most women for leadership roles. Consequently, the Task Force developed an analogy to the holistic VMI program, bringing together the co-curricular and the curricular to promote the student's development in all phases of her life. *See* Defs.' Exs. 11, 39.

In lieu of the adversative methods employed by VMI, the VWIL concept proposes a cooperative

method which reinforces self-esteem rather than the leveling process used by VMI. VWIL will be a highly structured program but without the extreme adversative VMI components, such as the rat line and breakout. In the opinion of one of the leading experts on the educating of women, Dr. Elizabeth Fox-Genovese, an adversative method of teaching in an all-female school would be not only inappropriate for most women, but counter-productive. Dr. Fox-Genovese's opinion is based on her extensive research which shows that most women reaching college generally have less confidence than men. It is the opinion of the Task Force that the methods adopted for the VWIL will produce the same or similar outcome for women that VMI produces for men. Dr. Fox-Genovese concurs in this assessment. Tr. 247-48 (Fox-Genovese).

In addition to its argument that the VWIL program is not sufficiently similar to the VMI methods to pass constitutional muster, the United States argues that the VWIL program will not attain its stated goals and that the financial planning is fatally flawed. I will address these objections in turn.

A. Differences between VWIL and VMI.

1. *Academic offerings and requirements of VWIL*

The general education requirements and the academic majors, as well as the admission standards, for VWIL students will be the same as those for regular MBC students. Plan at 8. VWIL students must complete a calculus course, either a statistics course or "an appropriate discipline-based quantitative methods course, two science courses with labs, in addition to

Biology of Women, and a microcomputer applications course "or the equivalent or by passing a competency test." Defs.' Ex. 39 at 6. VWIL students will take a leadership externship. According to the plan, this externship, "which should ideally be related to [the student's] major," will be distinguished from other externships by providing an opportunity to experience and reflect on leadership in practice. VWIL students will participate in the VWIL seminar, and in Saturday seminars three times a semester. Defs.' Ex. 39 at 8, 15. VWIL students will organize a Leadership Speaker Series for one semester of the junior year and one semester of the senior year. Defs.' Ex. 39 at 15. VWIL students will not attend any classes with male students. Tr. 101, 155 (Lott).

At trial, the government spotlighted the fact that VWIL students will have the opportunity to earn an engineering degree only if they participate in a 3-2 program with Washington University. According to the government this arrangement is constitutionally unacceptable given that VMI offers an engineering degree as well as several advanced math and physics courses that VWIL will not offer. Defendants explained however, that demand at present would not justify an engineering program at MBC. The Fourth Circuit, while amplifying its *VMI* decision in *Faulkner* stated explicitly that one of the factors to be considered by this Court in evaluating any proposed remedy is the demand for aspects of a particular program. *Faulkner*, 10 F.3d at 232. The compelling evidence is that there would be a very slight demand for an engineering program at the all female VWIL. Again, simply because a small handful of women may desire a mirror image VMI, or even an engineering

program in an all female environment, does not mean that the Commonwealth is constitutionally obliged to provide such. The Commonwealth has finite resources and it must identify demand for the various alternatives in higher education in the Commonwealth and allocate its resources accordingly.

The very concept of diversity precludes the Commonwealth from offering an identical curriculum at each of its colleges. Thus, in many instances, a prospective student must make a choice between the lifestyle of a college and a preferred course of study. For example, a prospective student may prefer the lifestyle at William and Mary in the eastern part of the state, but wants to study veterinary medicine which is offered only at VPI in the western part of the state. Here, a prospective VWIL student is faced with a similar choice—to go to VPI, a co-ed college which offers an engineering course and has an ROTC component, or to attend VWIL, which is all female, has an ROTC component but no on-campus engineering program. Each of Virginia's colleges cannot be all things to all people. Financial resources do not permit it nor does equal protection require it.

2. *VWIL/MBC Residence Life*

The residential life for VWIL students will vary significantly from the residential life of VMI students. The Task Force developed a model which will allow VWIL students to move in productive ways between the "walls" of VWIL and the MBC community. Defs.' Ex. 39 at 11-12. Upperclass VWIL students will be required to live for at least one year in the VWIL House. Defs.' Ex. 39 at 14-15. The VWIL House will not be operated on a military format. Defs.' Ex. 11 at 11; Tr. 374 (Tyson). The Task Force rejected VMI's extreme adversative model for the co-curriculum component because that model would not produce the same outcomes for the VWIL population as it does for the VMI population. Notwithstanding these differences, the VWIL program will use the highly disciplined schedule of the VMI model. Defs.' Ex. 39 at 12-14.

3. *The Military Component*

VWIL requires participation in an ROTC program. The United States argues that the VWIL ROTC component is a pale image of the military lifestyle at VMI, but in making the argument the United States confuses VMI's co-curricular military model of training with its ROTC program.

The only expert to testify on the effectiveness of ROTC programs was Major General Robert E. Wagner. He is a person who has devoted a substantial portion of his career to establishing, evaluating and standardizing ROTC programs in colleges throughout the United States. He compared outcomes of ROTC programs of co-ed colleges which had no military co-curricular lifestyle with the cadets from VMI who participated in ROTC and found no significant difference in the performance of VMI cadets and participants from co-ed colleges. For example, he found that the ROTC participants from the University of Virginia fared as well, and in some cases better, than VMI cadets.

4. *VWIL's Benefits/Outcomes*

VWIL is a good design for producing female citizen-soldiers and will be unique in the country. Tr.

249-50 (Fox-Genovese). The VWIL experience will not be the entirely militaristic experience of VMI. Instead, VWIL, because it is planned for women who do not necessarily expect to pursue military careers, incorporates the element of public service. *Id.* Although the United States showed unequivocally that the VWIL program differed from VMI in many ways, no expert for the United States testified that VWIL would not be educationally beneficial for women.

Defendants' witnesses, Dr. Richardson and Mr. Bunting, and United States witnesses, Drs. Conrad and Astin, agree that any given set of outcomes can be obtained by more than a single methodology. Tr. 608 (Richardson); Tr. 1550 (Bunting); Tr. 1076 (Conrad); Tr. 1302 (Astin). VWIL is a pioneering project. As such it cannot, by definition, boast of a VMI type record of producing "citizen soldiers." However, the evidence produced at trial indicates that MBC is committed to providing to the VWIL women benefits that are equal to or better than the benefits provided to men at VMI. As noted *supra*, MBC, with its experience in women's education and record of unique programs, believes that VWIL will accomplish its mission. Tr. 1529-30 (Tyson).

The government stressed the fact that the Commonwealth has not yet developed a firm methodology for evaluating the VWIL program and argues, therefore, the credibility of the plan is fatally undermined. The expert testimony at trial differed significantly in assessing the expected outcomes of the VWIL program. Perhaps the only conclusion that may fairly be drawn from the testimony in this regard is that attempting to evaluate the VWIL program before it is implemented is of questionable value. According to Dr.

Askegaard, evaluating a program is a retrospective exercise and terms like "citizen-soldier" must be operationalized before a program can be evaluated. Because the term "citizen-soldier" has not been operationalized, an assessment plan has not been developed.

Dr. Clifton Conrad, one of the government's experts on curricular and co-curricular education programs, testified that (1) many different means can be used to achieve the VMI outcomes, Tr. 1103-04 (Conrad), (2) his opinions regarding VWIL are informed guesses, and (3) he cannot evaluate the program until it has been implemented. Tr. 1260 (Astin).[5]

The government also offered testimony of Dr. Alexander Astin. Dr. Astin testified that the success of the VWIL program will depend upon who is attracted to the program and who forms the peer group and how the implementation of the program deals with the dilemma of what will be different and unique from the traditional MBC program. Because of these considerations, Dr. Astin concludes it will be difficult to realize VWIL's objectives. Tr. 1260 (Astin).

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[5] Dr. Conrad was asked by the Justice Department to analyze whether VWIL will provide to women benefits comparable to those provided to men at VMI. Tr. 1041 (Conrad). With respect to the components of the VWIL program, Dr. Conrad testified only that each is not "fully comparable" to VMI. Tr. 1047-51, 1061, 1063, 1067 (Conrad). Dr. Conrad testified that VMI and VWIL are not comparable in that there are differences. Dr. Conrad stated that he did not think that one program is better than the other. Further, Dr. Conrad testified on cross-examination that he does not consider himself an expert in single-sex education. He has not studied whether single-sex programs for women are different from single-sex programs for men. Tr. 1090-91 (Conrad).

Dr. Astin testified that the only way to know if VWIL can accomplish its outcomes is to implement VWIL and assess its outcomes. Tr. 1273 (Astin).[6] Dr. Astin conceded that, even if the Commonwealth of Virginia were to create the mirror image of VMI for women, it could not duplicate the alumni network, history, tradition and prestige of VMI. Tr. 1277 (Astin).[7] Finally, Dr. Astin testified, as did Dr. Conrad, that it is possible to achieve a similar educational outcome through different educational methodologies. Tr. 1302 (Astin). Dr. Astin further testified that his conclusions regarding VWIL's future outcome are speculative, Tr. 1287 (Astin), and that educators could reasonably disagree with his conclusion that the VWIL program will not be able to achieve its stated goals. Tr. 1305 (Astin).

Dr. Astin's personal ethical opposition to VMI's current all-male admissions policy impairs his objectivity in evaluating the VWIL program. Indeed, Dr. Astin has admitted that he has "a problem with any institution that excludes applicants on the basis of race or sex," that his "sense of equity and desire for the elimination of sexism and racism conflicts with [his] interest in supporting the most effective

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[6] Dr. Astin testified that the peer group is the key factor in any undergraduate student's development. Dr. Astin opined that the peer group in the VWIL program will differ radically from that at VMI and therefore the benefits will not be comparable. Tr. 1219-21 (Astin). However, Dr. Astin testified that he does not know what type of peer group will be in the VWIL program. Tr. 1272 (Astin).

[7] Dr. Astin acknowledged that he has made no study of the outcomes of VMI or of MBC. Tr. 1306-07 (Astin). He has not determined what would be required in the VWIL program to achieve VMI outcomes. Tr. 1289 (Astin).

forms of education," and that "some compromise in the quality of education is the price we must pay if we are to achieve fairness and equity." Defs.' Ex. 95. Dr. Astin's opposition to VMI's admission policy seems to be somewhat at odds with his flagship publication, *Four Critical Years*, wherein he extolled the virtues of single-sex education at the college level. The conflict arises from his present personal viewpoint on excluding females from publicly-supported colleges. Indeed, Dr. Astin has stated that because of this strong personal opinion, he would be willing to sacrifice beneficial pedagogical methods which infringe on his view. Defs.' Ex. 95. If I comprehend Dr. Astin's distinction correctly, he believes that single-sex education is beneficial for both men and women, but because of his ethical views it should not be practiced in publicly-supported colleges. In his view, as *Four Critical Years* bears out, single-sex education should be restricted to private colleges.

By adhering to the public-private distinction, Dr. Astin creates a different ethical quagmire. As Dr. Fox-Genovese pointed out, private colleges are prohibitively expensive for students who come from families that are in the middle and lower income strata of society. Moreover, the public-private shibboleth is more apparent than real. It cannot be gainsaid that private colleges receive substantial infusions of both federal and state money. Thus, the distinction Dr. Astin draws is illusory.

The United States also offered the testimony of Dr. Carol Nagy Jacklin who testified that the plan homogenizes women by assuming that there is an appropriate way to educate women. Tr. 873 (Jacklin). The essence of Dr. Jacklin's testimony can be summarized thusly: Gender is not a useful predictor

of learning patterns. Tr. 870-75 (Jacklin). Dr. Jacklin based her statement on her research which, according to her, shows a greater disparity in learning patterns within a gender group than exists between the two gender groups. She proceeded to illustrate her thesis with bell curve graphs as to each of the sexes groups. For both men and women the bell curve was a typical one—small numbers of persons at the beginning and ending with large numbers of persons in the middle. Of interest, however, was a narrow band where there was no overlap between the curve for males and the curve for females. When one thinks about Dr. Jacklin's conclusions, she is stating what educators—indeed, the public in general—have known for a long time; that people are born with varying degrees of ability and drive. It is certainly no revelation that within a given population of males, there will be slow learners, average learners, and fast learners. The same holds true with any given population of females. Thus, the bell curves are not surprising. Moreover, the education experts who find a need for single-sex colleges do not base their opinion on the difference in cognitive abilities of male and females, but rather on developmental and emotional differences between the sexes. *See, e.g.*, 766 F.Supp. at 1434-35 (Liability App. at VI.B)

Dr. Jacklin's testimony was contradicted by most of the evidence in the record.[8] In addition, Dr. Jack-

[8] Dr. Jacklin agreed that experts could reasonably disagree with her opinion. Specifically, Dr. Jacklin stated that experts could reasonably disagree as to how to accommodate differences in formulating educational programs. Tr. 906, 921-22 (Jacklin).

lin conceded at least two justifications for single-sex education: (1) men and women are treated differently in the classroom as evidenced by her observation of students at MBC who were passive, while the students she observed at VMI were interactive;[9] and (2) women have more chances for leadership at single-sex institutions. Tr. 887 (Jacklin).

5. *Pedagogical Justification for VWIL Program*

Several experts in women's education testified that VWIL was a pedagogically sound and justified program. Drs. Richardson, Riesman, and Fox-Genovese furnished testimony supporting the appropriateness of the VWIL program and each expressed the opinion that the VWIL approach towards educating and preparing women leaders was preferable to the VMI approach.

Dr. Fox-Genovese testified that VWIL does not need to use the same methodology as VMI with respect to the rat line and the adversative system and that based upon her study of literature and people, there would be little demand for a female VMI but there would be much more significant demand for VWIL. Tr. 138 (Fox-Genovese). Her personal experience and the "overwhelmingly scholarly evidence" —a portion of which is summarized in Defendants' Exhibit 130A—suggest that young women, by the time they reach college, have less confidence in themselves than young men. Young women, according to Dr. Fox-Genovese, do not need to have uppityness

[9] According to Dr. Jacklin, this trend could be exacerbated in a co-educational environment. Tr. 887 (Jacklin).

and aggression beaten out of them.[10] Dr. Fox-Genovese further explained that adolescence is a period of emotional stress and statistically, the emotional stress takes the form of delinquency in men and depression in women. According to Dr. Fox-Genovese, anorexia is rampant among young college women, in part because they doubt themselves and so they want to exercise control. The control they feel they can exercise is over their own bodies. This, testified Dr. Fox-Genovese, is a turning of energy inward instead of projecting it outward. She explained that anorexia is self-discipline turned pathological. What young women need to understand is the fit between a predictable order of the outside world and their own tendencies towards self-discipline. Tr. 252 (Fox-Genovese). Thus, she concluded, the adversative model is not appropriate to accomplish this result. Tr. at 250-52 (Fox-Genovese). Finally, Dr. Fox-Genovese testified that it is important for states to maintain tax-supported single-sex educational opportunities because of the expense of private single-sex programs. Public single-sex opportunities will provide the most benefit to poorer women and men who, according to Dr. Fox-Genovese, would probably benefit the most from single-sex education.[11] Tr. 291 (Fox-Genovese).

Dr. Richardson testified that "[T]here is not in the VMI paradigm a place for the woman leader

[10] Dr. Wilson concurred, testifying that women do not need the leveling experience of a rat line and adversative methods and that women are generally raised with a lower self-image than men. Tr. 340 (Wilson).

[11] Dr. Fox-Genovese explained: "My position is that the existence of [tax-supported] single-sex education is an extremely important option."

who excels and does those things that women are expected to do now and in the 21st century." Tr. 611-12 (Richardson). Dr. Richardson further testified that he does not believe that the VMI model is achievable from the public policy perspective because it is deficient from the standpoint of attracting a sufficient clientele and from the standpoint of achieving a reasonable degree of acceptance from the Commonwealth.[12]

Dr. Riesman testified that VWIL is a "wholly appropriate way to proceed" to prepare women as citizen-soldiers. Tr. at 539-40 (Riesman).[13] Dr. Riesman opined that the fact that this litigation may end with this new program and VMI still extant is a tremendous achievement, not only for Virginia but for the country. Tr. 474 (Riesman). Dr. Riesman stated, "Given the women now coming to higher education, what is offered in VWIL is a model for the country, with potentially enormous consequences to reverse the unhappy, often unequal, output of coeducation." After evaluating the Commonwealth's plan, Dr. Riesman concluded that VWIL will produce the kind of self-assurance in the face of accomplish-

[12] Dr. Richardson examined demand at Virginia Tech and at West Point and concluded that the demand for an all-women's VMI would be so small as to make the project unfeasible. Tr. 611-15 (Richardson). At trial, Dr. Richardson testified that he interviewed 20 women currently enrolled in the ROTC program at VPI and only one of the 20 wanted a VMI-type experience. Dr. Richardson further testified that a mirror-image VMI would only enroll 25-30 students.

[13] Dr. Riesman was not involved directly in preparing the Plan. Tr. 543 (Riesman). He knows MBC's president, Dr. Tyson, and has reviewed drafts of the Plan and responded to requests for his comments. Tr. 508 (Riesman).

ment of difficulties that VMI offers and requires of its cadets. Tr. 496 (Riesman).

Given the testimony of Drs. Fox-Genovese, Richardson and Riesman—and the absence of any testimony from the United States' experts indicating that VWIL's methodology is inappropriate or ineffective for women—I find that the differences between VWIL and VMI are justified pedagogically and are not based on stereotyping. This is not to say that some women cannot succeed within a VMI type methodology. The evidence at trial indicated that the VMI methodology could be used to educate women and, in fact, some women—such as the allegorical Jackie Jones—may prefer the VMI methodology to the VWIL methodology. As discussed above, however, the controlling legal principles in this case do not require the Commonwealth to provide a mirror image VMI for women. Rather, it is sufficient that the Commonwealth provide an all-female program that will achieve substantially similar outcomes in an all-female environment-and that there is a legitimate pedagogical basis for the different means employed to achieve the substantially similar ends. VWIL satisfies the Fourth Circuit's requirement that the Commonwealth adopt a parallel program for women which takes into account the differences and needs of each sex.

B. *Planning Assumptions*

The United States' second line of attack on the Commonwealth's plan is that the plan employs faulty financial assumptions.

1. *General Assumptions/Enrollment Projections*

At trial, the government challenged the planning assumptions underlying the VWIL. According to the government, the assumptions are faulty. Primarily, the government argues the Task Force's working assumption of 25 students in VWIL in the first year for planning purposes[14] is merely a guesstimate without a sound factual basis. I disagree. The Commonwealth acknowledges that the Task Force did not undertake a market study for VWIL, but offers two sound reasons for this. First, MBC's experience in attracting students to the traditional program informed its judgment that an intensified state-supported program would have sufficient appeal to make the program workable. Second, the 25 student estimate is based upon MBC's experience with the PEG program and is also a number beyond which incremental costs per student will not exceed incremental revenues. Tr. 219-20 (Lott).[15] Furthermore, there is no cap on the number of students MBC will accept into VWIL. MBC has additional residential capacity for 100-150, and MBC agrees it will accept VWIL students in lieu of traditional students if it becomes necessary. Tr. 131 (Lott).

MBC has a good record of success in developing and implementing innovative educational programs.

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[14] Tr. 210-11 (Lott); *See also* Plf.'s Ex. 102.

[15] Based on his experience with new programs in higher education in the Commonwealth, Dr. Finley testified that 25 is a good projection of the first VWIL class size. The prototype class for the new College of Integrated Science and Technology at James Madison University is 40. Dr. Finley has reviewed proposals for other new programs with numbers in the 10 to 25 range. Tr. 131 (Lott).

The success of MBC's PEG program validates MBC's ability to provide distinct programs and suggests that MBC has the ability to successfully implement the VWIL program.

2. *VWIL Financing*

The United States also disputes sufficiency of VWIL's financing as presented by Dr. Lott.[16] Dr. Lott, who has experience in planning for new educational programs and in funding new educational programs, testified that the VWIL program is adequately financed.[17]

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[16] Dr. Lott, Dean of MBC, developed the financial projections for the VWIL program that are reflected in Defendants' Exhibit 45.

[17] Dr. Lott testified that the financial projections that he prepared, and which are reflected in defendants' Exhibit 45, were based upon the amount of money necessary to cover the start-up costs of the VWIL program regardless of the number of students in the VWIL program. The start-up funding is adequate for the projected 25 VWIL students in the first year of operation, and, if more than 25 students are admitted to the VWIL program in the first year, the additional revenue from the Commonwealth, and the tuition provided by these students, will be adequate to cover the marginal increased costs. Tr. 220-21 (Lott).

Dr. Finley prepared a "Pro-Forma Expenditure & Income Statement" for the VWIL program based upon his review of the financial projections of the VWIL program prepared by Dr. Lott and his discussions with Dr. Lott. Defs.' Ex. 15. As projected by Dr. Finley, the VWIL program will produce income in excess of expenditures for the first four years of operation of $48,700; $215,775; $398,026; and $606,559. The projected contingency funds available for the first four years of operation of the VWIL program are 7.7%, 24.8%, 35.2% and 43.7% of revenues over expenditures. Defs.' Ex. 15. In conducting his review, Dr. Finley relied upon the professional

The United States argues that there is no reason to expect the increased tuition revenues to meet the increased costs of additional students. At trial, however, Dr. Finley stated that the tuition and fees received from new students combined with revenues received from the state contract could accommodate increased admissions. Both Dr. Lott and Dr. Finley

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judgment of Dr. Lott and that of his colleagues in putting the VWIL program together. Dr. Finley's approach was to review with Dr. Lott each of Dr. Lott's assumptions to determine whether it was reasonable, and to review with the MBC administration whether it had resources in place to address each of the components of the Remedial Plan. Dr. Finley testified that he was convinced that this had been accomplished. Tr. 1488 (Finley).

Dr. Finley testified that based upon his discussions with Dr. Lott, his knowledge of Dr. Lott's professional experience, and based upon a series of questions posed, he believed that Dr. Lott had used appropriate concepts in developing his financial basis for the VWIL program, had thought through the VWIL program very carefully, and had well laid his plans for adding faculty where needed. Tr. 1460-61, 1512 (Finley). Furthermore, in addition to the anticipated income in excess of expenses stated above, the VWIL program will have the additional asset of the Unique Military Appropriation which will be shared per capita by the entire Virginia Corps of Cadets. Tr. 1466-67 (Finley); 668-70 (Sgro).

Based upon his analysis and review, Dr. Finley opined that, if more than 25 students enroll in the VWIL program the first year, increased economies of scale would permit the program to be financially feasible. Tr. 1467 (Finley). On the income side, the revenue from tuition and fees would increase, the VMI endowment income would remain the same, and the state contract would expand to accommodate the additional students. The Budget Bill, as introduced, contains the proviso that, in the event more than 25 students enroll in the first year, the Commonwealth would put in additional monies on a per-student basis to accommodate the increase. Tr. 1467 (Finley).

are well-experienced in funding new educational programs. They approached the task in the same manner that most businesses use in predicting necessary funds for a new venture, i.e., a *pro forma* statement based on assumptions of what is likely to occur in the future. The assumptions of Drs. Lott and Finley are reasonable, and that is all that is required at the planning stage.

The United States also argues that the out-of-pocket costs for VWIL students will be greater than those of VMI cadets.[18] This conflicts directly with Dr. Sgro's testimony that the VWIL tuition will cost the same as VMI tuition. Dr. Sgro testified that the Commonwealth of Virginia will provide the same amount of financial support to MBC for in-state cadets in the VWIL program that it provides to VMI on a per full time equivalent student basis. Defs.' Ex. 12; Tr. 667-68 (Sgro).[19]

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[18] According to the United States, each institution will collect $6,830.00 in tuition from each student. The United States argues that VMI students will have an additional $490,415.00 of state financial aid distributed to them to help defer the costs of the $6,830.00 in tuition and fees—but no money has been designated by the Commonwealth to help defer the amount of tuition and fees to be collected from VWIL students. The evidence indicates, however, that the Commonwealth will pay dollar-for-dollar for VWIL students as it pays for VMI. Defs.' Ex. 12 at 94. For a student to obtain additional funds at either institution, he/she must qualify for student aid on the basis of need.

[19] In addition, the Unique Military Appropriation which VMI receives will be shared on an equal, pro rata, basis with MBC and Virginia Tech so that each of the three corps of cadets will receive financial support from the Unique Military Appropriation presently provided only to VMI. Tr. 668-70 (Sgro); Tr. 1466-67 (Finley); Defs.' Ex. 12 at 128-29. Furthermore, the State Cadetships, presently allotted only to VMI, will be shared equitably among the students participating in the three Corps of Cadets. *Id.*

The Commonwealth's Support of the Remedial Plan

The Commonwealth of Virginia has an avowed policy of offering a diversity of choices in higher education. The Fourth Circuit expressed misgivings as to whether VMI's all-male admissions policy was in fact an official state policy. The record in this case shows the Commonwealth's unambiguous and unequivocal support of single-sex education for men and women. Contrary to the perceptions of many, the Commonwealth's position in this Court has always been supportive of VMI's all-male admissions policy because it adds to the diversity of choices in Virginia's higher education system.[20] This support is evidenced by the affidavits of all of the Commonwealth's top officials entered into the record in this case.

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[20] Although former Governor Wilder, during his brief campaign for the 1992 Democratic presidential nomination, made extrajudicial statements criticizing VMI's all male admissions policy, his position in this Court has always been one supporting VMI's all male admissions policy. *See* Governor Wilder's Answer, Liability Trial. In any case, Governor Wilder's prior extrajudicial statements against VMI's all male admissions policy notwithstanding, the former Governor's affidavit tendered in this phase of the litigation again expresses his support of single-sex education for men and women by "approv[ing] the remedial plan proposed by the VMI defendants." *See* VMI Remedy Ex. 5. *See also* Defs.' Ex. 11-R at 2-3. (Governor Wilder's statement supporting the VWIL plan stating that he is "satisfied that this plan is educationally sound and will remedy all current discrimination.").

Governor George F. Allen has filed an affidavit in which he states that: "[VWIL] will enhance diversity in Virginia higher education and provide for the women of the Commonwealth a unique and innovative educational alternative." Defs.' Ex. 1 at 1-2.[21] Former Governor L. Douglas Wilder filed an affidavit approving the remedial plan, Defs.' Ex. 5, and has commented that "I and my staff have worked closely with Mary Baldwin College and VMI in crafting a program to remedy the discrimination. . . . [and VWIL] extends to women across our Commonwealth the benefit of a single-sex education which Virginia presently makes available to men at VMI." Defs.' Ex. 11-R at 2. Lieutenant Governor Donald S. Beyer, Jr. has also filed an affidavit supporting the remedial plan stating that VWIL "will enhance and contribute to the diversity of educational opportunities which are available to college-age women in Virginia and will make Virginia a leader in providing such opportunities to women. Diversity of educational opportunity is a hallmark of the Virginia system of higher education." Defs.' Ex. 2 at 1. Attorney General James S. Gilmore, III. has also filed an affidavit supporting the remedial plan as have J. Paul Councill, Jr., the Chairman of the House of Delegates Education Committee, and Elliot S. Schewel, Chairman of the Senate Education Committee. Virginia's Secretary of Education, Dr. Beverly H. Sgro supports the Proposed Remedial Plan because it provides diversity of education in Virginia,

[21] In addition to supporting the remedial plan, Governor Allen explains in his affidavit that a VMI for women "is economically prohibitive. 'The lack of demand, the dubious educational benefit and the tremendous cost of establishing such a college preclude that option." Defs.' Ex. 1.

which is one of the primary goals of Virginia as stated in the Report of the Commission on the University in the 21st Century. Defs.' Ex. 213. The State Council on Higher Education has also indicated its support of the Proposed Remedial Plan stating that it would be "pleased to work with the administration of [MBC] to develop the strongest possible program should the proposal submitted to the court be judged acceptable." Defs.' Ex. 8. Finally, that the Commonwealth's 1994-96 budget bill, which funds the remedial plan and passed both houses of the legislature, indicates clearly the Commonwealth's support of single-sex education for women and men. In short, every person in Virginia officialdom who has or has had the authority to affect Virginia's policies on higher education has spoken in favor of diversity by offering single-sex education to men and women of the Commonwealth and have strongly supported VWIL.

Conclusion

VWIL is a new venture and no one can predict with certainty its outcome. The evidence, however, supplies a reasonable basis for predicting success in attaining its stated goals. No doubt the program will need further adjustment as experience dictates; however, according to Dr. Lott, the program is fully developed conceptionally and ready to be implemented for the Fall of 1995. During the implementation of VWIL, it will remain under the supervision of this Court.

The Commission on the University in the 21st Century has recommended that "private colleges and universities should be encouraged to expand enrollment (in response to projected increases of college-

bound students), supported by the Tuition Assistance Grant Program and the contract for services program." Defs.' Ex. 213. In exercising its sovereign prerogative to structure its system of higher education, the Commonwealth has determined to follow the recommendations in the Report of the Commission on the University of the 21st Century by providing diversity in education and utilizing the talents of private colleges within its borders. Defs.' Ex. 11 at 4. In so doing, it has chosen to maintain VMI as an all-male institution and, through VWIL, to maintain an all-female institution.[22] *See generally*, Defs.' Ex. 11.

If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination. The defendants' Proposed Remedial Plan will be approved.

An appropriate order will enter.

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[22] As one commentator aptly observes, the purpose of the remedy in this case "is not that VMI ought to be preserved as an all-male bastion, but that the Commonwealth ought to be given broad leeway in determining how best to ensure that women are provided an equal opportunity within the Commonwealth's system of higher education." Allan Ides, *The Curious Case of the Virginia Military Institute: An Essay on the Judicial Function*, 50 Wash. & Lee L.Rev. 35, 47 (1993).

ORDER

For the reasons stated in the Memorandum Opinion filed contemporaneously with this Order, it is hereby ADJUDGED and ORDERED that:

1. Defendants' Motion to approve their Proposed Remedial Plan is GRANTED;
2. Defendants' are directed to proceed with all deliberate speed in implementing the Plan and to have the Plan operational for the academic year commencing in the Fall of 1995;
3. the Court will retain jurisdiction in order to supervise implementation of the Defendants' Plan;
4. Defendants' will be required to submit status reports apprising the Court of the progress of the Plan implementation every six (6) months;
5. this ruling is dispositive of all pre-trial motions.

APPENDIX: FINDINGS OF FACT

I. Witnesses ..... [87a]
A. Expert Witnesses ..... [87a]
B. Fact Witnesses ..... [99a]

II. The Proposed Remedial Plan ..... [101a]
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III. Status Report/VWIL Program Specifications ..... [107a]
A. Mission of VWIL ..... [107a]
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C. Military Leadership and Training ..... [109a]
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F. VWIL/MBC Residence Life ..... [115a]
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H. Endowment ..... [120a]
I. VWIL Access to VMI Alumni Network ..... [120a]

IV. Mary Baldwin College (MBC) ..... [122a]
A. History/Background ..... [122a]
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V. VMI ..... [129a]

VI. Differences Between VWIL and VMI ..... [129a]
A. Faculty ..... [129a]
B. Endowment ..... [129a]
C. Physical Training Facilities ..... [130a]
D. Academic Programs ..... [131a]

The findings of fact set forth in this Appendix fall into three categories: (1) the curriculum vitae of each of the expert witnesses and a description of the fact witnesses for each side; (2) a description of the VWIL plan; and (3) a profile of Mary Baldwin College and how it compares with VMI.

Because a great majority of these findings are historical facts and are essentially uncontroverted, I found it convenient to use the format and much of the substance of the Defendants' Proposed Findings of Fact. Virtually all of these findings provide references to the record for their support.

Unless otherwise indicated, all references to exhibits and trial transcripts refer to the remedial phase of this litigation. Transcript citations refer to the unofficial transcript.

I. WITNESSES

A. *Expert Witnesses*

(i) Defendants' Expert Witnesses

1. Lewis D. Askegaard testified as a defense expert in educational assessment. He earned a B.A. in English, a Master of Education Degree in Curriculum, and a Ph.D. in Educational Evaluation from the University of Virginia. He has participated in a number of federally funded assessment projects, has trained educators and social workers in assessment methodology, has assisted the State of Virginia in designing assessment strategies, has served on numerous evaluation committees for the Southern Association of Colleges and Schools, has served on the Steering Committee of the Virginia Assessment Group, and is recommended by the Southern Asso-

ciation of Colleges and Schools as an expert in assessment. Currently, Dr. Askegaard serves as Associate Dean of Mary Baldwin College, Registrar, and Director of Institutional Research. Tr. 1361-65 (Askegaard); Defs.' Ex. 110.

2. Josiah Bunting, III, testified as a defense expert in higher education with concentration on single-sex education, and as an expert in leadership. He graduated from VMI in 1963, won a Rhodes Scholarship, and earned an M.A. at Oxford. He served in the United States Army from 1966 to 1972, serving in the infantry, and as Assistant Professor at West Point. From 1972 to 1973, he was Professor and Acting Head of the Department of Strategy, U.S. Naval War College. From 1973 to 1977, he served as President of Briarcliff College, then an all-female college. From 1977 to 1987, he was President of Hampden-Sydney College, an all-male college. Since 1987, he has served as Head Master of The Lawrenceville School, a private preparatory school in Lawrenceville, New Jersey, where he presided over the school's change in status from single-sex to co-educational. Mr. Bunting served as a defense expert in the liability phase of this case. Tr. 1536-39 (Bunting); Defs.' Ex. 111.

3. Paul O. Davis testified as a defense expert on human physiology. Dr. Davis served as a defense expert in the liability phase of this case. He earned a Bachelor's Degree from Columbia Union College, a Master's Degree in physical education from American University, and a Ph.D. from the University of Maryland College of Health and Human Performance, Department of Kinesiology, with a major in exercise physiology and a minor in research design and statistics. He has taught physical education to

both sexes at the elementary school, junior high school and high school levels, and has taught applied physiology at the University of Maryland. Liability Tr. 879-84 (Davis). He is a Fellow of the American College of Sports Medicine. Tr. 1399-1400 (Davis). He has consulted extensively for the United States Armed Forces on developing physical training programs for men and women. Liability Tr. 882-84 (Davis). Dr. Davis has published prolifically in his field. Defs.' Ex. 113.

4. Donald J. Finley testified as a defense expert in higher education finance in Virginia. Dr. Finley has a Doctor of Education Degree in Higher Education Administration from the College of William and Mary, and Bachelor's and Master's Degrees in Business Administration from the University of Richmond. He has served as Assistant Director of the State Council of Higher Education for Virginia, as Staff Director and Senior Fiscal Analyst for the House Appropriations Committee of the Virginia General Assembly, as Deputy Secretary of Finance for the Commonwealth of Virginia, and as Secretary of Education for the Commonwealth of Virginia under Governor Robb and Governor Baliles. Dr. Finley presently serves as Associate Director of the State Council of Higher Education for Virginia, with responsibility for finance and facilities. Tr. 1450-58 (Finley); Defs.' Ex. 114.

5. Elizabeth Anne Fox-Genovese testified as a defense expert in women's issues, feminist theory, gender, higher education with particular reference to women's education, single-sex education and curriculum development, and the history of American women. She is currently professor of history and Eleonore Raoul Professor of the Humanities at

Emory University in Atlanta, Georgia. She is also an associate member of the English Department, a core member of the Women's Studies Department, and a member of the Comparative Literature faculty.

Dr. Fox-Genovese began her work in women's studies as an assistant professor at the University of Rochester, where she taught one of the first courses nationally in Women's History and developed an interdisciplinary minor in Women's Studies. In 1980 she moved to the State University of New York at Binghamton to help design the first graduate program in Women's History in the country. In 1986, she was selected in a national search to become Founding Director of Emory University's Women's Studies program, which encompasses an undergraduate minor, an undergraduate major, graduate degrees, and certifications in Women's Studies.

She has published a number of books, including *Feminism Without Illusions: A Critique of Individualism* (University of North Carolina Press, 1991) and *Within the Plantation Household: Black and White Women of the Old South* (University of North Carolina Press, 1988), 45 articles, and numerous lectures. She has been selected by the United States to direct a national project on women in history, serves as a member of the Steering Committee of the Holmes Group to study the state of contemporary education, served as a member of the Steering Committee for the National Assessment Project, serves as a member of the Steering Committee of the National History Standards Project, and serves as a board member of the American Academy for Liberal Education, which is developing new accreditation standards for small liberal arts colleges. Tr. 225-35 (Fox-Genovese); Defs.' Ex. 115.

6. James D. Lott testified as a defense expert in higher education, single-sex education, leadership education for women, curriculum and program development. Dr. Lott serves as Dean of the College at Mary Baldwin College. He received his B.A. from the University of Tennessee, M.A. from Vanderbilt University and a Ph.D. at the University of Wisconsin. He has taught for 30 years at MBC. In his 30 years of experience at a women's college, he has developed expertise in curriculum development, single-sex education, women's cognitive, moral, and leadership development, and the development of new programs, including financial planning. Tr. 52-67 (Lott); Defs.' 116.

7. Richard C. Richardson, Jr., testified as a defense expert in higher education, with particular expertise and hands-on experience in developing academic co-curricular programs and in public policy and higher education. Tr. 603-06 (Richardson). Dr. Richardson is also an expert in women's education. Tr. 640 (Richardson). He is Professor of Educational Leadership and Policy Studies at Arizona State University. He holds a B.S. degree in education from Castleton State College, an M.A. from Michigan State University, and a Ph.D. from the University of Texas. He served in the Marine Corps for three years. He taught at an all-female college, Vermont College, from 1958 to 1961, and has both professorial and administrative experience at several colleges and community colleges, including institutions with large minority populations. His publications include *Creating Effective Learning Environments: State Policy and College Learning* (Denver, Co., Education Commission of the States, March 1993); *Improving State and Campus Environments for Quality*

and Diversity: A Self-Assessment (with Matthews and Finney, Denver, Co., Education Commission of the States, 1992); *Promoting Fair College Outcomes: Learning from the Experiences of the Past Decade* (Denver, Co., Education Commission of the States, 1991); *Achieving Quality and Diversity: Universities in a Multicultural Society* (with E.F. Skinner, New York, ACE/McMillan, 1991); and *Fostering Minority Access and Achievement in Higher Education: The Role of Urban Community Colleges and Universities* (with L.W. Bender, San Francisco, Jossey-Bass, 1987). He testified as a defense expert in the liability phase of this case. Liability Tr. 661-66 (Richardson). He has also been retained by the United States to testify on its behalf in race discrimination lawsuits involving higher education. He has served as chair of 25 evaluation teams on behalf of regional higher education accreditation boards, including the team that most recently evaluated West Point. Defs.' Ex. 118. His research in the past 10 years has focused on "the impact of students on colleges and the impact of colleges on students." Liability Tr. 664-65 (Richardson).

8. David Riesman, Henry Ford II Professor of Social Sciences, Emeritus, at Harvard University, testified as a defense expert in sociology, with a particular emphasis on culture, personality and character, higher education in the United States and single-sex education for women. Tr. 506-07 (Riesman). He holds a bachelor's degree from Harvard College, a law degree from Harvard Law School and honorary degrees from more than twenty institutions. After completing a year of postgraduate study, he served as the last law clerk to Justice Louis D. Brandeis of the United States Supreme Court. He

taught at Buffalo School of Law, and served as a research fellow at Columbia Law School in sociology and anthropology. He joined the faculty at the University of Chicago in 1946, and returned to Harvard in 1958. He is regarded as "one of the first and still is one of the most influential among social scientists who have systematically applied the concepts of culture and personality to contemporary society. His book, *The Lonely Crowd*, is highly acclaimed in the field, and his concepts of 'inner-directed' and 'other-directed' [personalities] have been incorporated into the general vocabulary." Liability Tr. Defs.' Ex. 8 at 29. He has focused his research in recent years on the development and present state of American higher education. Clark Kerr, head of The Carnegie Foundation on Higher Education, described Dr. Riesman as "the best informed, most insightful, most interesting commentator on higher education in the United States. And he has no peer in any other nation." Defs.' Ex. 124. His many publications include *The Lonely Crowd* (1950); *Constraint and Variety in American Education* (1956); *The Academic Revolution* (with Christopher Jencks 1968); and *On Higher Education: The Academic Enterprise in an Era of Rising Student Consumerism* (with several collaborators 1980). His latest book is *Choosing a College President: Opportunities and Constraints* (1990). Dr. Riesman served as a defense expert in the liability phase of this case. Defs.' Ex. 119.

9. Cynthia Haldenby Tyson testified as a defense expert in single-sex education for women, women's educational development and women's leadership development. Dr. Tyson is President of Mary Baldwin College. She previously served as Vice President for Academic Affairs, Dean of the College, Chairman of the Division of Humanities, and English Professor

at Queens College, Charlotte, North Carolina (then a women's college), as well as Associate Professor of English at Seton Hall University (then a men's college). She received her B.A., M.A. and Ph.D. degrees from the University of Leeds in England. Dr. Tyson has spent 25 years focusing on the education of women at two women's colleges as a teacher and an administrator. She has written and lectured widely on women's education. She has also received certificates in advanced studies for college administrators at Harvard University. Dr. Tyson has served as president of the Southern Association of Colleges for Women and as a commissioner of the Southern Association of Colleges and Schools. Tr. 358-67 (Tyson); Defs.' Ex. 121.

10. Major General Robert Edwin Wagner, U.S. Army (Retired), testified as a defense expert on leadership in the military. Tr. 565 (Wagner). General Wagner currently serves as Executive Assistant to the President of Norfolk State University, a predominantly Black institution. Before his recent retirement from the military, General Wagner served as Commanding General of the United States Army ROTC Cadet Command where he supervised all of the Army's pre-commissioning training. A liberal arts graduate of VMI, Major General Wagner served 33 years as an armor officer, in positions ranging from platoon leader to assistant division command. He spent three years in Vietnam. Tr. 550-66 (Wagner); Defs.' Ex. 122.

11. Heather Anne Wilson testified as a defense expert in the psychological, social, emotional and intellectual development of college women. Dr. Wilson is Dean of Students at Mary Baldwin College, responsible for residence life, student activities, international students, housing and counseling. She holds a B.A. in English from Bucknell University, a Master's degree in Counseling from Boston University, a Master's in Institutional Research and Planning from Columbia University, and a Doctorate in Higher Education from Columbia University. The primary focus of her 20 years' experience in higher education has been the education and development of women. She has worked at coeducational and single-sex colleges—the University of Arkansas, Oklahoma State University, Marymount College in New York City and Clarkson University. Her experience includes work both as a counselor to women students and as a supervisor and developer of counseling services for women students. She has also been involved in developing leadership programs for women. Tr. 326-33 (Wilson); Defs.' Ex. 123.

(ii) Government's Expert Witnesses

1. Alexander William Astin testified as a Government expert in higher education, assessment and the comparability of higher education programs. He received his Bachelor's Degree from Gettysburg College and his M.A. and Ph.D. Degrees from the University of Maryland. Dr. Astin is currently Professor of Higher Education at the University of California at Los Angeles and Director of the Higher Education Research Institute there. Dr. Astin's books include *What Matters in College? Four Critical Years Revisited* (1993); *Assessment for Excellence: The Philosophy and Practice of Assessment and Evaluation in Higher Education* (1991); *Four Critical Years* (1977); and *The College Environment* (1968). *Higher Education* (1991); *Four Critical Years* (1977); and *The College Environment* (1968). Tr. 1216 (Astin).

2. Mr. James Francis Brewer, III, testified as the United States' expert in planning, designing and operating higher educational facilities. Tr. 818 (Brewer). He has been Director of Physical Plant at the University of Maryland at College Park since 1985. He holds B.S. and M.B.A. degrees from the University of Maryland. He testified for the United States in the liability phase of this case. Plf.'s Ex. 9.[1]

3. Clifton Conrad testified as the United States' expert on curricular and co-curricular offerings. Tr. 1040 (Conrad). He is currently Professor of Higher Education and Coordinator of the doctoral program in Higher Education at the University of Wisconsin-Madison, and previously had been on the faculties of the University of Denver, the College of William and Mary, and the University of Arizona. He holds a Bachelor's Degree from the University of Kansas and a Ph.D. in higher education from the University of Michigan. His books and monographs include *The Undergraduate Curriculum* (1978), *Liberal Education in Transition* (1980, with Jean Wyer), and *Curriculum in Transition: Perspectives on the Undergraduate Experience* (1990, with Jennifer Haworth). In 1987-88, he served as president of the Association for the Study of Higher Education.

[1] Mr. Brewer testified on the facilities at VMI and MBC. From the liability phase, the Court is already familiar with VMI facilities. Both the Justice Department and the Defendants submitted video tapes of MBC which depicted MBC facilities. Defs.' Ex. 44A; Plf.'s Ex. 104, Mr. Brewer's testimony, essentially factual in nature, shed little additional light on this marginal issue, and the Court is not in need of expert testimony to assist in its understanding of the schools' facilities.

Plf.'s Ex. 7. He testified for the government in the liability phase of this case, and on behalf of the Civil Rights Division on other occasions. In the liability phase this Court concluded that Dr. Conrad's testimony was entitled to "little weight" because his opinions were based on his personal belief that single-sex education, while beneficial, should not be provided by the public sector. *United States v. Virginia*, 766 F.Supp. at 1412.

4. Carol Nagy Jacklin testified as a Government expert in the psychology of gender, psychology of gender as it relates to learning, developmental psychology and developmental psychology as it relates to learning. Tr. 854-55 (Jacklin). Dr. Jacklin is currently a professor of psychology and Dean of Social Sciences and Communication at the University of Southern California. She received Bachelor's and Master's Degrees from the University of Connecticut and a Ph.D. from Brown University in psychology. She published *The Psychology of Sex Differences* (1974, with Eleanor Maccoby), a meta-analysis. She is a Fellow of the American Psychology Association and a Fellow of the American Psychology Society. Tr. 851-55 (Jacklin); Plf.'s Ex. 6.

5. Michael S. Kimmel testified as a Government expert in historical sociology and the sociology of gender. Tr. 935 (Kimmel). Dr. Kimmel received his B.A. from Vassar College, his Master's Degree from Brown University, and his Doctorate from the University of California at Berkeley. He is an Associate Professor of Sociology at the State University of New York at Stony Brook and is presently a visiting professor at Berkeley. He has taught, published and lectured in the area of comparative historical

sociology of gender. He is currently editor of *Masculinity* and is President of NOMAS, the National Organization of Men Against Sexism. Tr. 928-35 (Kimmel); Plf.'s Remedy Ex. 8.

6. Larry Lee Leslie testified as the Government expert in higher education finance. Dr. Leslie is Professor and Director of the Center for Study of Higher Education at the University of Arizona. The focus of his academic work has been the economics and financing of higher education. He received his Bachelor's and Master's degrees from the University of Minnesota and his Doctorate in Education from the University of California, Berkeley. Dr. Leslie has testified on three other occasions for the Civil Rights Division. Tr. 731-36 (Leslie); Plf.'s Ex. 4.

7. James A. Peterson testified as a Government expert in fitness training for women. Dr. Peterson currently serves as Director of Sports Medicine for StairMaster Sports Medical Products, a company owned by his brother. He has a B.S. Degree in Business Administration from the University of California, Berkeley, and Master's and Ph.D. degrees in Physical Education from the University of Illinois. He has taught physical education in high schools and colleges. He was in charge of cadet basic training at West Point and was involved with the physical training of women at West Point after coeducation. Remedy Tr. 1114-16 (Peterson). He has also worked at the Women's Sports Foundation at Stanford University. He has written books and articles on fitness training, including the development of certain physiological characteristics in women. Tr. 1111-19 (Peterson); Plf.'s Ex. 3.

B. *Fact Witnesses*

(i) Defendants' Fact Witnesses

1. Carole Lewis Anderson is a member of the Board of Trustees of Mary Baldwin College. She received a liberal arts degree from Penn State University in 1966 and a Master's degree in Business from New York University in 1976. Ms. Anderson worked as a securities analyst and as a merger and acquisitions specialist in the Corporate Finance Department of Paine Webber. In 1985, she became a corporate director and Senior Vice President in charge of corporate development for Hasbro, Inc. She also served as president of the Infant Products Division. In 1987, she joined MNC Investment Bank in Washington, D.C., as President of the Investment Banking Division. Since 1990, she has operated a financial consulting business in Washington, D.C. Tr. 438-40 (Anderson).

2. Paul D. Maini is the Executive Vice President of the VMI Alumni Association. Tr. 459 (Maini). He graduated from VMI in 1966, served as a career Army officer, rising to the rank of lieutenant colonel. He received a Master's Degree in history at Florida State University, attended the Navy War College at Newport, Rhode Island, taught Army ROTC at VMI and taught Western Civilization at the Naval Academy before returning to VMI. Mr. Maini testified as a fact witness in the liability phase of this case. Liability Tr. 870-75 (Maini).

3. Beverly Huston Sgro became the Secretary of Education for the Commonwealth of Virginia in January 1994. She previously served as Dean of Students at Virginia Polytechnic Institute and State University, as Executive Assistant to the Vice Presi-

dent for Student Affairs, as Assistant Director of Student Activities, and as Coordinator for Greek Affairs at Virginia Tech. She holds a Bachelor of Science degree in Speech Pathology and Audiology from Texas Women's University, and a Master of Science in Management, Housing and Family Development and a Ph.D. in Educational Research and Evaluation, with an emphasis on policy analysis, both from Virginia Tech. Tr. 661-63 (Sgro); Defs.' Ex. 120.

(ii) Government's Fact Witnesses

1. Captain Tamara Frezell, U.S. Army, is a 1989 graduate of the U.S. Military Academy at West Point. She is a native of Petersburg, Virginia. She served in the Quartermaster Corps and is now a member of the West Point staff serving as Equal Opportunity Admissions Officer. Tr. 983-84 (Frezell).

2. Colonel James Siket, United States Army, is a graduate of West Point and a career Army officer. He has a Master's Degree in Business Administration from Auburn University. He is a graduate of the Army War College. He has spent the last six and one-half years as Regimental Tactical Officer and Brigade Tactical Officer at the U.S. Military Academy at West Point.[2]

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[2] The United States proffered the testimony of Col. Siket who described a "day in the life" of West Point cadets. As this subject was covered at length in the liability phase of this proceeding, the Court granted the defendants' motion to strike the testimony of Col. Siket, and his testimony played no part in the Court's determination of the issues on remand. Tr. 981 (Siket).

II. THE PROPOSED REMEDIAL PLAN

A. *Development of VWIL at MBC*

1. In academic year 1992-93, Dean Lott established a long-range planning process. As part of the process, the faculty informally reexamined MBC's mission and began considering a more deliberate focus on leadership. At the same time, Dr. Wilson increased emphasis on leadership development in the co-curriculum and won a grant to develop a leadership program. Parallel development in the curricular and co-curricular areas prepared MBC for a new venture in leadership formation. Tr. 73-74 (Lott).

2. In midsummer 1993, President Tyson discussed with Dean Lott the possibility of developing a program for the education and training of women citizen-soldiers. Tr. 74-75 (Lott). The purpose was to meet the Commonwealth of Virginia's desire to provide women the access to a single-sex educational program which would prepare them for leadership positions in civilian and military life. Tr. 73-74, 204 (Lott); *see also* Defs.' Exs. 11, 39. Lott and Tyson examined what VMI meant by the term "citizen-soldier" and used as a starting point the notion that a citizen-soldier is comfortable with and capable of taking on leadership positions in civilian, both private and public, and in military life. Tr. 89-90 (Lott). A four part holistic program is envisioned to produce women citizen-soldiers: the curriculum, the co-curriculum, military training including ROTC, and physical education and training. Tr. 74-75 (Lott); Defs.' Exs. 11, 39. The MBC Board of Trustees' Executive Committee approved the concept in July 1993. Tr. 76 (Lott).

3. President Tyson and Dean Lott then discussed the concept with other members of the MBC executive staff. They were also in contact with Dr. Richardson. Tr. 75, 219 (Lott). At the end of the summer, the MBC executive staff called together twelve senior faculty leaders and reviewed the concept with them. Tr. 75 (Lott). President Tyson also surveyed by telephone the full Board of Trustees during the planning phase. Tr. 76 (Lott); 457-58 (Anderson). The MBC faculty voted to approve the development of VWIL on September 24, 1993. Tr. 75-76 (Lott).

4. On September 24, 1993, MBC entered into an agreement with the VMI Foundation, Inc., which committed to provide funding for VWIL if it receives court approval. Defs.' Ex. 11-N.

5. On September 25, 1993, Dr. Tyson met with the VMI Board of Visitors and reviewed the VWIL concept. The Board of Visitors voted to provide the cooperation and resources of VMI to VWIL and to submit the VWIL proposal in the Proposed Remedial Plan. Defs.' Exs. 11-O, 11-Q.

6. On September 25, 1993, Governor Wilder approved the Plan. Defs.' Ex. 5.

7. As provided in the Plan, President Tyson designated a Task Force co-chaired by Deans Lott and Wilson to refine and plan for implementation of VWIL. The Task Force includes faculty, administration and student representation. Tr. 76-80 (Lott). Members of the Task Force include a political scientist interested in opportunities for women in political life and experienced in using quantitative methods in approaching problems; a professor of sociology and anthropology, with a particular interest in cultural and societal structures; the college residence

life coordinator, who has particular expertise in developing women's leadership programs; an MBC alumna and professor of theater who understands the need for both cooperative and command leadership; a student in the class of 1996 who is a resident advisor and leader in her own right; and a professor of philosophy with a strong interest in leadership ethics. The Committee also calls on *ad hoc* members as particular expertise is needed in the areas of physical education and training, ROTC and developmental psychology. Tr. 80-82 (Lott); Defs.' Ex. 39 at 17.

8. The Task Force studied leadership issues and the research literature on the developmental psychology of women and the cognitive development of women. Task Force deliberations focused on issues of leadership and the question whether women lead and learn differently than men. The Task Force prepared a bibliography and summaries of literature reviewed by the Committee. The Task Force integrated its collective experience with the research literature. Tr. 83-85, 87-88 (Lott); Defs.' Ex. 131.

9. All elements of the faculty, staff and students came together to design the program and to talk about each other's areas. Dean Wilson, in charge of student life, could offer her thoughts on curriculum. The faculty could offer their thoughts on student life. Tr. 335 (Wilson). The Task Force developed an analogy to the holistic VMI program, bringing together the co-curricular and the curricular to promote the student's development in all phases of her life. Tr. 110 (Lott). It is an intentionally designed program where all the elements promote the same goals and values, a more intentionally holis-

tic program than the traditional MBC program. Tr. 334-35 (Wilson).

10. From late October to January 17, the Task Force met six times. Members also worked independently. Dean Lott spent close to half his working hours on the VWIL development. Tr. 82 (Lott).

11. Dean Lott and Dean Wilson visited VMI twice. Other Committee members also visited VMI. Tr. 84 (Lott). The Task Force reviewed the assessment materials from VMI and examined the VMI methodology and outcomes. Defs.' Exs. 25, 26, 65; Tr. 87 (Lott). The Task Force considered carefully, in light of their collective experience and the literature on women's education, where VWIL should follow or depart from the VMI methodology to produce the same outcomes. Tr. 83-85 (Lott). On visits to VMI, they observed VMI's holistic education which integrates curriculum and co-curriculum. Tr. 85, 110 (Lott).

B. *Contract For Services*

1. The Plan provides for the Commonwealth to enter into a contract for services with MBC and VMI for VWIL. Defs.' Ex. 11 at 3. Such arrangements have been recommended in a study on the University of the 21st Century commissioned by the General Assembly of Virginia. Defs.' Ex. 213. The study recommends private contracts to eliminate duplication and increase efficiency in higher education. The report also foresaw an increase in the student population in the 1990's and recommended contracts with private colleges as a means by which the Commonwealth could accommodate a growing student

population without building additional facilities. Tr. 367-69 (Tyson).

2. Dr. Tyson has authority on behalf of MBC to enter into a contract for services with respect to VWIL. Tr. 369 (Tyson).

C. *Cooperation With VMI and VPI*

1. VMI has committed to support the VWIL program. On September 25, 1993, the VMI Board of Visitors voted to support MBC's development of VWIL. Dr. Tyson has had periodic conversations with the Superintendent of VMI and the President of the VMI Board of Visitors who have reaffirmed VMI's support. Tr. 369-70 (Tyson).

2. The cooperation to date between VMI and MBC with respect to VWIL has been excellent, that there has been cooperation on many levels, and that VMI has pledged to help in any way MBC asks. Tr. 370 (Tyson). The cooperation between MBC and VMI officials was readily apparent throughout the course of the Phase II proceedings.

3. The Plan provides for establishment of a Joint Advisory Board for Leadership Education between MBC and VMI. The Board will be designed to advance the leadership program and the citizen-soldier concept. It will be composed of faculty, administrators and trustees from MBC and VMI. Among its tasks will be continuous study of the advancement of leadership training at VMI and MBC. There will be evaluation of the assessments and outcomes of the two programs to advance the cause of the citizen-soldier. In addition, the Board will arrange for exchange of faculty and potentially for joint meetings

of students in co-curricular settings. Tr. 370-72, 425, 427 (Tyson); Defs.' Ex. 11 at 15-16.

4. Under the Plan, VWIL will also cooperate with Virginia Tech and VMI in the Virginia Corps of Cadets. Defs.' Ex. 11; Tr. 424 (Tyson).

D. *MBC's Commitment to VWIL*

1. MBC undertook to establish VWIL for several reasons: first, MBC is committed to the education of women in a single-sex environment. Second, MBC faculty have expertise in educating women. They also have experience in innovation. MBC's innovation and creativity characterize it as much as its dedication to single-sex education for women.

2. MBC is committed to continuing the development of VWIL in accordance with the Plan and, specifically, to achieving outcomes comparable to VMI. Tr. 1528 (Tyson).

3. The administration of MBC is professionally and personally deeply invested in the VWIL program and determined to make it succeed. Tr. 344-45 (Wilson).

E. *Further Development Of VWIL*

1. The Task Force proposes to complete development of the curriculum by the end of the current academic year. Tr. 129-30 (Lott). The Task Force will continue to meet and confer with VMI, particularly with respect to co-curriculum and the physical training programs. Tr. 130 (Lott).

2. With Court approval, it is expected that VWIL will admit its first students in the 1995 fall semester. Tr. 130 (Lott).

STATUS REPORT/VWIL PROGRAM SPECIFICATIONS

The Status Report of January 17, 1994 (Defs.' Ex. 39) sets forth the conclusions of the Task Force and the programmatic components of VWIL. On February 4, 1994, the faculty approved unanimously the Status Report and the continuation of the planning process. Tr. 83-86 (Lott). The Status Report recites that VWIL "is based on a working hypothesis about leadership at the beginning of the 21st Century and about the advantages of single-sex education in the development of the qualities of mind and character of women leaders." Defs.' Ex. 93, at 1.

A. *Mission of VWIL*

1. The MBC Task Force concluded that VWIL is appropriate to MBC's commitment "to the education of women for a world of expanding opportunity" in ways which "will lead to flexibility of mind and strength of values and provide the foundation for future careers, professions and positions of leadership." Defs.' Ex. 39 at 4.

2. VWIL will be a publicly-supported, single-sex education program with military training for women.

3. The stated mission of VWIL is to produce "citizen-soldiers who are educated and honorable women, prepared for the varied work of civil life, qualified to serve in the armed forces, imbued with love of learning, confident in the functions and attitudes of leadership, and possessing a high sense of public service." Defs.' Ex. 11 at 7.

B. *Academic Offerings and Requirements of VWIL*

1. The general education requirements and the academic majors for VWIL students will be the same as those for regular MBC students. Defs.' Ex. 11 at 8.

2. The admission standards for the VWIL would be the same as for the traditional MBC program. Tr. 131 (Lott).

3. VWIL students must complete a calculus course. Defs.' Ex. 39 at 6. MBC currently offers calculus courses, and offered these courses in the 1990-91 school year. Plf.'s Ex. 39 at 79; Plf.'s Ex. 36 at 135-136.

4. VWIL students must complete either a statistics course or "an appropriate discipline-based quantitative methods course. . . ." Defs.' Ex. 39 at 6.

5. VWIL students must complete two science courses with labs, in addition to Biology of Women. Defs.' Ex. 39 at 6.

6. VWIL students must complete a microcomputer applications course "or the equivalent or by passing a competency test." Defs.' 39 at 6.

7. VWIL students will take a leadership externship. This externship, "which should ideally be related to [the student's] major, will be distinguished from other externships by providing an opportunity to experience and reflect on leadership in practice. For instance the student may work for a person whose position she would like to have in ten years and may, in addition to the standard expectations of an externship, be required to keep a journal in which she analyzes and evaluates the leadership styles and strategies she encounters in the externship." Defs.' Ex. 39 at 7; TR 97, lines 13-19 (Lott).

8. VWIL students will participate in the VWIL Seminar, and in Saturday Seminars three times a semester. Defs.' Ex. 39 at 8, 15. VWIL students will also organize a Leadership Speaker Series for one semester of the junior year and one semester of the senior year. Defs.' Ex. 39 at 15.

9. Although eight male non-residential students currently attend some classes with traditional MBC undergraduate women, no male students will attend classes with VWIL students. Tr. 101, 155 (Lott).

10. VWIL students will have the opportunity to earn an engineering degree. Presently, MBC students may participate in a 3-2 program with Washington University. Dean Lott is also "in conversation now with another institution closer-by and [is] moving toward an agreement which would allow a student that option (3-2 engineering)." Tr. 101-02 (Lott). VWIL students would not receive the VWIL tuition discount while participating in the engineering program at Washington University. Tr. 696-97 (Sgro), Defs.' Ex. 12 at 94.

C. *Military Leadership and Training*

1. All VWIL students will be required to complete four years of ROTC. The program at MBC will be conducted by ROTC professors from VMI. Academic classes will be conducted on the MBC campus by the ROTC faculty, who are active duty military personnel. The content and design of the courses are uniformly directed for all ROTC by the respective Armed Service. In addition to classes, organized laboratory activities will be conducted on designated afternoons either on the MBC campus or at the ROTC facilities on the VMI campus. MBC will provide transporta-

tion to and from the VMI campus. Juniors and Seniors who are not candidates for a commission will be required to participate in alternative leadership laboratory activities. Physical training and evaluation activities separate from those directed by the Physical Education Department will be conducted by the ROTC faculty, and the ROTC faculty will provide counseling and advising on the MBC campus on a scheduled basis. Defs.' Ex. 39 at 10.

2. The total number of semester hours credit for four years of ROTC is 12. In addition, a six week intensive summer camp between the junior and senior years will provide externship credit for students seeking a commission. Defs.' Ex. 39 at 11.

3. VWIL students will constitute a corps of cadets. They will have military rank, will wear uniforms and will drill in ROTC and as part of the Virginia Corps of Cadets. Nothing in the VWIL Plan precludes increasing the amount or type of military exercises. Tr. 118-21; 159 (Lott).

4. The Plan provides for establishment of a Virginia Corps of Cadets, comprised of the all-female VWIL, the all-male VMI and the coed Virginia Tech Corps. Defs.' Ex. 11 at 17-18. As members of the Virginia Corps of Cadets, VWIL students will have distinctive military uniforms, different from the ROTC uniform. Tr. 105 (Lott).

5. The Governor of Virginia will be the Commander in Chief of the Virginia Corps of Cadets. The Virginia Corps of Cadets will participate in parades and perhaps field exercises and other activities. Tr. 670 (Sgro).

6. For approximately one week each summer VWIL freshmen must participate in a "cadre week orientation." Plan at 11.

7. VWIL students will not be required to wear uniforms during the school day other than while participating in ROTC or Virginia Corps of Cadets activities. TR 166, lines 15-19 (Lott); TR 409, lines 7-12 (Tyson).

8. Traditional MBC students would not wear military uniforms. TR 166, lines 20-23; 167, line 1 (Lott).

9. VWIL students will not be required to eat meals together. TR 407, lines 21-23; 408, lines 1-7 (Tyson).

D. *Physical Education and Training*

1. VWIL students must take 8 semesters of physical and health education courses. Defs.' Ex. 39 at 8. These courses are: advanced fitness ("a course designed for VWIL students"); swimming; tennis; golf; racquetball; and "additional physical education courses, and two health courses." Defs.' Ex. 39 at 9.

2. In the sophomore, junior and senior years students will take tennis, golf, racquetball, additional physical education courses, and two health courses. A course in self-defense will be part of the curriculum, and all VWIL students will have training in self-defense and self-assertiveness through a Cooperative Confidence Building program ("CCB") and through the required weekend workshops which will make up an important part of the co-curricular component of the Institute. Defs.' Ex. 39 at 9.

3. All VWIL students will complete a battery of fitness assessments at the beginning of the Freshman year and at the end of all subsequent semesters. The Physical Education faculty will establish a set of

standards with appropriate recommendations for a standard of maintenance. The results of the tests will be incorporated into the evaluation of the VWIL student in the health or physical education course she is taking during that semester. Defs.' Ex. 39 at 8-9.

4. The VWIL physical education program will have a self-defense component rather than a boxing component. Tr. 1442 (Davis).

5. VWIL will require tennis, golf and racquetball because, according to the Task Force, these sports are popular among corporate leaders. Tr. 107 (Lott).

6. The MBC Physical Education Department will develop the CCB as a co-curricular component. CCB will be held twice a week. The CCB was designed to be analogous to the VMI "rat challenge," and will consist of physically and mentally challenging events, including obstacle courses, rappelling, a ropes course, and team building activities. Students enrolled in VWIL will be required to participate in this program their freshman year, unless they are involved with practice for a varsity athletic team. Sophomores, juniors and seniors who are not involved with practice for a varsity team will have the choice of participating in the CCB program as leaders or participating in a personal workout program. The latter will be designed to assure that the student meets and maintains the standard of physical fitness determined by the Physical Education faculty. Defs.' Ex. 11 at 11.

7. The physical training test for women in VWIL is designed to be comparable in rigor and challenge to the physical training test for men at VMI. Tr. 178 (Lott). The VWIL physical and health education component is based on the VMI physical education program. Tr. 106 (Lott).

8. The VWIL Program's physical training component will produce women who are capable of serving physically in the military service. Tr. 443 (Anderson).

9. Physical performance standards will be set by MBC's physical education faculty in consultation and cooperation with the physical education faculty at VMI. National norms and standardized tests for physical fitness will be utilized. The ROTC physical fitness requirements for women are standardized nationwide. Tr. 109, 160 (Lott).

10. Sharon Spalding, a member of the Physical Education Department at Mary Baldwin College, holds a certification as an Exercise Specialist from the American College of Sports Medicine. That certification demonstrates the expertise to design, implement and evaluate a physical education and physical training program. Tr. 1403-04 (Davis).

11. The VMI Physical Education Department possesses the attitude, the resources and an avowed desire to assist MBC in any way appropriate in implementing a comparable program at MBC. Both departments are committed to the VWIL Program. Both departments desire to put in place the comparable program at MBC, as demonstrated by the VWIL requirement of eight semesters of physical education, which is unique in undergraduate education. The two staffs working together have the ability to design, implement and evaluate the VWIL Program so that it will be comparable to VMI's. Tr. 1404-05 (Davis).

12. VMI will make the Rat Challenge facilities available to VWIL. Tr. 1134-35 (Peterson).

E. *Co-Curriculum*

1. VWIL students will be required to participate in a one-week wilderness-type orientation the summer before their freshman year. The VWIL Orientation will take place the week before regular orientation and will be run by upper class VWIL students. The Orientation will give upper class students the opportunity to plan, to organize, and to lead; and it will provide freshman with a physically and mentally demanding experience which will foster bonding and which will be a paradigm for VWIL itself. Defs.' Ex. 39 at 12.

2. Freshmen VWIL students will room together and will be housed in separate sections of freshman halls to facilitate the development of group identity while also encouraging good relationships and friendships with other freshmen. Freshmen will be subject to a number of rules which will provide an externally imposed order on their daily lives. While the regulations are still being developed, they will include the following: Students will be required to keep their rooms neat (and subject to spot inspection); they will not be allowed to smoke in their rooms; they will not be allowed to change roommates during the first year but will instead be expected to work through any interpersonal problems which arise. They will also have a required study hall from 7 to 9:00 Monday through Thursday. Defs.' Ex. 39 at 12-13.

3. Freshmen VWIL students will take many of the same academic courses, will have the same physical education and ROTC experiences, and will work together in teams in the CCB. Defs.' Ex. 39 at 13-14.

4. As MBC students, VWIL participants will be encouraged to participate in MBC activities and class

functions, and will be subject to the rules and regulations of the Honor System and the Judiciary System. Defs.' Ex. 39 at 13-14.

5. Throughout the Freshman year, students will be mentored by upper class VWIL students, and, as VWIL develops, the upper class students will play an important role in modifying the design of the freshman year to make it as effective as possible in orienting first year VWIL students to the standards and expectations of the Institute. Upper class students will lead the VWIL contingent of the Virginia Corps of Cadets, will organize and direct the Corps drills, will be responsible for enforcing regulations and maintaining *esprit de corps*, and will play a central role in the VWIL orientation and in the CCB. Defs.' Ex. 39 at 14.

6. After the Freshman year, VWIL students will be required to live for at least one year in the VWIL House, a residence hall which will also be the center for VWIL meetings and activities: determination of the required residence period in the VWIL House will be made on the basis of program enrollment and VWIL's experience with balancing the considerations of segregation and integration described below. VWIL House residency will provide students with a "lab" for community building and leadership development. VMI Defs.' Ex. 39 at 15.

F. *VWIL/MBC Residence Life*

1. Rejecting both total segregation and total integration, therefore, the Task Force developed a model which will allow VWIL students to move in productive ways between the "walls" of VWIL and the MBC community. Defs.' Ex. 39 at 12.

2. Upper class VWIL students will be required to live for at least one year in the VWIL House. Defs.' Ex. 39 at 14. The VWIL House will not be operated on a military format. TR 413, lines 19-21 (Tyson). No regulations or requirements have been developed for the VWIL House. Tr. 413, lines 9-15 (Tyson).

3. VWIL students will set their own rules and regulations in the VWIL House, within the larger framework provided by the VWIL code of conduct. Tr. 356 (Wilson).

4. Upper class VWIL students will play the role of mentor and monitor of the freshmen students. Upper class students will orient freshmen and teach them the standards and expectations of VWIL. Tr. 114-15 (Lott).

5. VWIL will have a class system, including the mentoring system, in which upper class students teach and mold freshmen. Tr. 1052-53 (Conrad); 114 (Lott).

6 VWIL residential regulations will be enforced and monitored by upper class students in the program. Tr. 335 (Wilson).

7. Upper class students will lead the VWIL contingent of the Virginia Corps of Cadets, organize and direct the corps' drills, be responsible for enforcing regulations, maintaining esprit de corps and play a central role in the VWIL orientation and the confidence building program. Tr. 114-15 (Lott); Defs.' Ex. 39 at 14.

G. *VWIL's ROTC Component*

1. The ROTC programs at VMI operate independently of the barracks system and its various components such as the rat line, and nothing about the

ROTC programs at VMI is unique to VMI other than the absence of women. *United States v. Virginia*, 766 F.Supp. at 1424 (Findings III.G.3 and 4).

2. All military training for VWIL students will be mandatory for four years, including participation in ROTC. Tr. 105 (Lott).

3. For VWIL students, military training leading to the opportunity to be commissioned in the armed services will be provided by the ROTC program in which all VWIL students will be required to enroll. The courses in ROTC will be taught at MBC, and the labs in ROTC will be held at MBC. The exceptions to ROTC activities at the MBC campus will be the use of facilities which MBC does not have (for example a rifle range). Tr. 104-05 (Lott).

4. The purpose of ROTC is to combine quality undergraduate education with tough, centralized training focusing upon duty, honor and leadership development. Tr. 567 (Wagner).

5. Army ROTC training is standardized, both on campus and off campus, including summer camp. Tr. 568 (Wagner).

6. At the highest levels, there are similarities among the Army, Navy and Air Force ROTC programs, especially in the kind of leadership that the programs seek to achieve in their graduates. Tr. 560-61 (Wagner).

7. The principles of leadership are the same in all the services. Tr. 565 (Wagner).

8. Army, Air Force and Navy ROTC physical fitness standards and tests are standardized nationwide. Defs.' Exs. 29, 30, 32.

9. The Army ROTC summer camp is a very important training experience that occurs between the

junior and senior year in which cadets are put under a regime that rivals Ranger school. Tr. 568 (Wagner).

10. The ROTC program at summer camp does not include an adversative training methodology like the VMI rat line, nor is that methodology necessary to achieve the objectives of Army ROTC. There is no yelling at ROTC cadets to induce stress. Tr. 581-82, 570-71 (Wagner).

11. It is not necessary for a college ROTC student to wear a uniform around the clock to become a successful military leader. Tr. 596 (Wagner).

12. It is not necessary for a college ROTC student to go through a rat line experience comparable to that at VMI to become a successful military leader. Tr. 596 (Wagner).

13. It is not necessary for a college ROTC student to live in a barracks operated with a system comparable to VMI to be successful military leaders. Tr. 596 (Wagner).

14. The majority of officers in the Army are liberal arts majors. The majority of Army platoon leaders, battalion commanders, division commanders who fought in Desert Storm were liberal arts majors. Tr. 580-81 (Wagner).

15. VWIL students will wear ROTC uniforms at designated times. VWIL students will also wear uniforms, different from ROTC uniforms, as part of the Virginia Corps of Cadets at designated times. Tr. 104-05 (Lott).

16. For academic years 1991, 1992 and 1993, there were respectively, a total of 3,924, 3,703 and 3,613 college ROTC cadets enrolled in coeducational residential military corps of cadets. Of these, 234, 222 and 232 were females, respectively. Defs.' Ex. 88.

17. Through the six senior military colleges, four of which are coeducational, for FY 92 and FY 93, the Army commissioned a total of 310 and 302 ROTC cadets, respectively, of which 19 and 8 were females, respectively. Defs.' Ex. 89.

18. For FY 92 and FY 93, the Army commissioned, respectively, a total of 4,699 and 4,284 ROTC cadets from civilian and military college programs, of which 791 and 665 were female, respectively. Defs.' Ex. 89.

19. Army ROTC Cadets are assessed by the Army Accession Board between their junior and senior years. Evaluation packets for each cadet are prepared by the cadet's professor of military science, and concern three general evaluation areas: military performance, academic performance and, very importantly, the recommendation of the professor of military science. Tr. 572 (Wagner).

20. VMI ROTC students scored an average of 35.45 for the period 1988 through 1993 on Accession Board scores. ROTC students from all other colleges or universities scored an average of 35.98. Thus, VMI ROTC students scored marginally below the average for all other colleges and universities on ROTC Accession Board scores for this period. Tr. 579 (Wagner); Defs.' Ex. 89.

21. Women ROTC graduates from military colleges during the period FY 88 to FY 93 scored an average of 36.5 on ROTC Accession Board scores. Women ROTC graduates from all other colleges and universities (civilian) scored an average of 36.1 on ROTC Accession Board scores. The difference is not statistically significant. Tr. 579 (Wagner); Defs.' Ex. 89.

22. Women ROTC graduates from Texas A & M, a military college, performed no better on Accession Board scores than women who went to the University of Virginia, a civilian university. Tr. 578 (Wagner).

H. *Endowment*

1. MBC's endowment is $20.5 million. Tr. 1543-44 (Bunting).

2. The VMI Foundation will endow the VWIL program with a permanent endowment of $5.4625 million in addition to its other financial contributions. A comparison of MBC's endowment with similar institutions indicates that MBC has an above average endowment. For example, the endowment of Mary Washington College is $15 million. Tr. 1481 (Finley); the endowment of James Madison University is approximately $9 million. Tr. 1481 (Finley); and, the endowment of Radford University is $6 million. Tr. 1481 (Finley).

I. *VWIL Access to VMI Alumni Network*

1. The VMI Alumni Association has pledged to support MBC and the MBC Alumni Association with respect to VWIL graduates. Tr. 459-60 (Maini); Defs.' Ex. 7.

2. To assist the VMI Admissions Office, the VMI Alumni Association maintains an alumni recruiting network designed to educate young people about the benefits of a VMI education. The VMI Alumni Association will do likewise with respect to VWIL. For example, on college nights where VMI's alumni serve as volunteers, they will provide prospective VWIL students with information about VWIL's military

leadership education or advise young women how to obtain it. Tr. 460-61 (Maini); Defs.' Ex. 11-I.

3. Since 1988, the VMI Alumni Association has assisted VMI alumni who find themselves unemployed. The Association has developed a network of business owners, corporations, VMI graduates and non-graduate employers who are interested in hiring VMI graduates. The Alumni Association will make this placement service available to VWIL graduates. Tr. 461-62 (Maini).

4. The VMI Alumni Association publishes a placement newsletter monthly. The newsletter includes all people the Association knows of who are seeking employment. The newsletter is mailed to the members of the placement network in the hope that employers will identify graduates who fit their needs. With the increase of the job opportunities available to women the demand by VMI alumni employers will increase. VWIL graduates will have the same access to the VMI placement network as VMI graduates. Tr. 462-63 (Maini).

5. The VMI Alumni Association has presented a commitment in which it agrees to open its networks to the women who are graduates of VWIL and to insure that they have opportunities available through those networks, as well as opportunities for externships. This commitment will provide opportunities for advancement to VWIL graduates. Tr. 421-24 (Tyson).

6. The relationship contemplated by the two alumni associations is a strong partnership of mutual support and cooperation. The attitude of VMI alumni toward VWIL is extremely supportive. They are committed to making VWIL work. Tr. 464-65 (Maini).

7. The VMI Alumni Association is opening its network to VWIL graduates, providing them with access to leadership positions. Tr. 374-75 (Tyson).

V. MARY BALDWIN COLLEGE (MBC)

A. *History/General Background*

1. MBC was founded in 1842. Under the leadership of Mary Julia Baldwin. Miss Baldwin enlisted the educator and textbook author Dr. Williams Holmes McGuffey to develop a program of study for women patterned on the curriculum of mathematics, classics and science offered to men at the University of Virginia. Tr. 67-68 (Lott); Defs.' Ex. 69 at 1.

2. MBC possesses those characteristics of single-sex schools that lead to beneficial outcomes praised by the United States Department of Education in its recent study of single-sex schools. Defs.' Exs. 128, 129.

3. MBC has a chapter of *Phi Beta Kappa* and was the first women's college to be granted a circle of *Omicron Delta Kappa* Society, which honors leadership, service and scholarship. Defs.' Ex. 11-A at 5, Plf.'s Ex. 27.

4. In the late 1960's and early 1970's, MBC responded to the women's movement. The college broadened its curriculum to include the new options open to women in business and the professions and developed an emphasis on career planning. Defs.' Ex. 11-A at 6, Plf.'s Ex. 27.

5. MBC is committed to the education of women for a world of expanding opportunity. The College has computerized the campus, renovated its main classroom building to enhance the learning climate, developed new facilities for the communications and

computer science disciplines and purchased new state of the art equipment for its science labs. It has established the Rosemarie Sena Center for Career and Life Planning. Defs.' Exs. 11-A at 7-8, Plf.'s Ex. 27.

6. MBC is accredited by the Southern Association of Colleges and Schools. The last re-accreditation occurred in the academic year 1987-88. Tr. 70 (Lott).

7. There are 1,327 students currently enrolled in courses offered by MBC. Approximately 600 students are traditional undergraduate residential women students. About 50 students are enrolled in the Program for the Exceptionally Gifted (PEG), a residential program for academically gifted high-school age girls who are talking college-level work. Approximately 60 students are enrolled in the coeducational non-residential Master of Arts in Teaching program. About 25 students are enrolled in the Extension Program in Goochland, Virginia. Approximately 600 students are enrolled in the coeducational Adult Degree Program (ADP) which is a non-residential program conducted at branch facilities. Tr. 71-72 (Lott); Defs.' Ex. 69 at 2.

8. MBC has 73 full-time faculty and approximately 40 part-time faculty. Approximately 44% of the faculty are tenured. The student/faculty ratio in the traditional program is eleven to one. Tr. 72 (Lott).

9. MBC offers 28 undergraduate majors in the arts, sciences, business and mathematics. Tr. 72 (Lott); Defs.' Ex. 11-A at 10-11, Plf'.s Ex. 27. Currently, about 15% of MBC students major in mathematics or science. Tr. 158 (Lott). MBC also offers pre-law, pre-med and teacher education. Defs.' Ex. 69 at 1.

10. MBC offers an engineering degree program in cooperation with Washington University in St. Louis. Students spend three years at MBC and two years at Washington University to complete the requirements for a Bachelor's degree in engineering. Tr. 101 (Lott); 1614-16 (Bunting); Defs.' Ex. 11-A at 12, Plf.s Ex. 27.

11. MBC requires an externship of every student equivalent to three semester hours. Faculty and the Director of the Sena Career Center assist in setting up externships and establishing guidelines to maximize the experiential education. Tr. 100-01 (Lott); Defs.' Ex. 11-A at 10.

12. MBC's NCAA intercollegiate athletic program includes basketball, swimming, field hockey, lacrosse, volleyball and tennis. MBC offers fencing, soccer, track, softball and riding as club sports. Defs.' Ex. 11-A at 152.

13. The residence life philosophy of MBC is that students learn not only from the classroom but from each other in the residence halls which are extensions of the classroom. The residential life is designed to provide an experience in flexibility, creativity, accountability and compassion with goals of personal growth and development and self-responsibility in the living community. Students run the residence halls, making their own rules and regulations within the larger framework of MBC's code of conduct, and with the guidance of staff. Freshmen have far less autonomy than upper class students. Tr. 356-57 (Wilson); Defs.' Exs. 67 at 1, 82.

14. More than 150 leadership positions are available to the women of MBC through student government, residence halls, class offices, interest groups and athletics. Defs.' Ex. 11-A at 151.

15. The average combined SAT score of MBC entering freshmen is approximately 930. The VMI Defendants' Objections and Responses to the United States of America's First Set of Interrogatories on Remand at 23 (¶ 38) and 24-25 (¶ 42) (filed 10/22/93); Tr. 303-07 (Fox-Genovese); 653-54 (Richardson). This approximately 100 point differential from VMI is within 30 points of the national average differences between young women and young men. Tr. 1544-45 (Bunting).

16. MBC has been listed among the top ten liberal arts colleges in the Southeast four times in the last eight years by *U.S. News and World Report.* The magazine uses a quantitative methodology and makes its comparison based on five measures: reputation based on a survey of 2,600 college presidents, deans and admission officers nationwide; financial resources, including educational and general expenditures per student, and endowment; selectivity, including SAT scores and acceptance percentage; faculty resources, including faculty preparation; and graduation rates. Tr. 1373-74 (Askegaard); 1618 (Bunting); Defs.' Ex. 125. MBC also has been listed in *Best Buys in College Education,* published by the *New York Times.* Tr. 1374 (Askegaard).

17. MBC has a record of success in developing new programs and operating distinctive and unique programs within the larger traditional undergraduate residential community. For example, the Program for the Exceptionally Gifted (PEG) was introduced in 1984. PEG is a unique residential program for academically gifted, high school age girls. Over fifty students are presently enrolled in the program and reside together in a separate residence hall with its own regulations. The program is unique in that it is

the only early college program in the United States that acknowledges the academic, emotional and developmental needs of young women. The traditional MBC residential program has proven a compatible and supportive setting for PEG. Defs.' Exs. 69 at 2, 78.

18. Mary Baldwin College is not a military school. Tr. 399, lines 17-19 (Tyson).

19. Mary Baldwin has no tradition of producing military leaders, or of training its students for the military. Tr. 146, lines 10-12; 149, lines 16-17 (Lott); Tr. 406, lines 2-5 (Tyson); Tr. 584, lines 21-23; 585, lines 1-8 (Wagner).

20. ROTC is currently available to Mary Baldwin College students through the program at James Madison University, although in the past three years no MBC student has been commissioned.

21. Currently, there is one MBC student participating in ROTC. Plf.'s Ex. 39 at 117; Tr. 405, lines 2-4, lines 18-19 (Tyson); Defs.' Response to U.S. First Set of Interrogs. on Remand, No. 22 (10/22/93).

22. MBC is already geared in the direction of trying to encourage women to persist in math and physics. Tr. 478-79 (Riesman).

23. Neither MBC nor VMI is a research institution. They are institutions whose missions are to educate; they are fundamentally pedagogical in that they focus on teaching, rather than research. Tr. 244-45 (Fox-Genovese).

B. *MBC Facilities*

1. MBC has a 55-acre campus in Staunton, Virginia for its undergraduate residential program for women. The campus includes the facilities of the former Staunton Military Academy ("SMA"), which

MBC purchased in the late 1970's. Tr. 134-35 (Lott); Defs.' Ex. 11-A at 6.

2. There are sixteen residence halls on the Mary Baldwin campus, which together house about 650 students. Students have a wide range of living arrangements from which to choose, including traditional residence halls, college-owned apartment buildings, and converted single-family dwellings. Tr. 825, lines 3-10 (Brewer); Plf.'s Ex. 39 at 147-148.

3. The traditional residence halls house from about 40 people to about 160 people, and no two residence halls are alike. Each has different room configurations, room sizes, capacities and decor. Residence halls are elegantly equipped with brass chandeliers, plush carpeting and mahogany furniture. Tr. 826, lines 12-23 (Brewer); Plf.'s Ex. 43 at 4.

4. About half of Mary Baldwin's residence halls are converted single-family homes, which are located on campus or in the residential areas immediately adjacent to the campus. Each houses from five to sixteen students, has its own distinct character, and is completely furnished by the college. Tr. 825, lines 8-11; 827, lines 13-23—Tr. 828, line 1 (Brewer).

5. There are also two theme houses—"special interest houses"—for upperclass students, one for honors students and one for community volunteers, both of which are equipped with televisions, cable hookups and microwave ovens. Plf.'s Ex. 43 at 6; Plf.'s Ex. 39 at 148.

6. MBC provides a wide variety of options to students who wish to entertain male visitors. Six residence halls have "unrestricted" or 24-hour visitation, with 72-hour overnight visitation for males visiting Mary Baldwin students. Six residence halls have

"unrestricted" weekends (Friday 1:00 p.m. to Sunday 11:30 p.m.) and "regular" hours weekdays (Monday-Thursday 5:00 p.m. to 11:30 p.m.). The remaining have regular hours with more limited weekend privileges. Plf.'s Ex. 39 at 148; Plf.'s Ex. 43 at 6-7.

7. About 18 percent of the rooms on the Mary Baldwin campus are single rooms. Tr. 827, lines 6-9 (Brewer).

8. At MBC, the largest bathroom serves approximately 35 or 40 students. At VMI there is one bathroom on each stoop, serving up to 400 students.

9. At MBC, each shower or tub has a door or curtain, while at VMI there are gang showers containing about 24 heads.

10. At MBC, each residential room has a solid door with a lock. At VMI the barracks rooms doors have windows and are unlocked. Tr. 830, lines 13-22—Tr. 831, lines 1-14 (Brewer).

11. Tullidge Hall, a SMA barracks, is one of the residence halls which may be used for the VWIL program. It can house approximately 50 students. Tr. 137 (Lott). MBC has capacity for 100-150 additional residential students. Defs.' Ex. 11 at 12.

12. The Pearce Science Center has 32 laboratories. Tr. 138 (Lott).

13. MBC provides a total of eight computer laboratories with more than 100 individual student computers on campus. Tr. 138 (Lott).

14. The MBC Physical Activities Center is a 40,000 square foot physical education facility which includes four racquetball courts, two gymnasiums, locker rooms, a fully-equipped weight training room, fencing facility and athletic training room. Outside are several playing fields. The King Building houses

a gymnasium and swimming pool. Swimming facilities are available also in the olympic-size pool at the Staunton Racquet Club, three blocks from campus. There are a dozen lighted tennis courts. Tr. 139-40 (Lott).

V. VMI

For a Complete record of the Findings of Fact regarding VMI, see this Court's opinion at 766 F.Supp. 1407. Those findings of fact were affirmed by the Fourth Circuit at 976 F.2d 890.

VI. DIFFERENCES BETWEEN VWIL AND VMI

A. *Faculty*

1. MBC maintains a faculty holding significantly fewer Ph.D.'s than the faculty at VMI. While 86% of VMI's faculty holds Ph.D.'s, 68% of MBC's faculty hold such degrees. Tr. 768 (Leslie).

B. *Endowment*

1. In fiscal year 1989-90, the VMI fund and plant revenues reflect the amount of approximately $4,751,310 from the VMI Foundation. Stip. 207. The Foundation completely funds the VMI Keydet Investment Club which is a $200,000 academic program. Stip. 209.

2. Direct aid and support to VMI by the VMI Foundation and affiliated agencies for 1987-88 totalled $6,765,859; for 1988-89 totalled $7,225,755; and for 1989-90 totalled $7,703,775. Ans. to Int. 15, the VMI Foundation, Inc. and VMI Alumni Association's Responses to the Second Set of Interrogatories Propounded by the United States (12/11/90) at 17-18.

3. MBC has an endowment of approximately $19 million, VMI has the largest endowment on a per student basis than any other undergraduate institution in the nation—$131 million. Tr. 770 (Leslie). There is also a difference in the projected endowments of the two institutions based on future commitments; whereas VMI will add an additional $220 million dollars thrcugh these commitments, MBC will add $35 million. Tr. 770 (Leslie).

C. *Physical Training Facilities*

1. MBC has seven tennis courts and two multi-purpose fields for field hockey, lacrosse, and soccer. One gymnasium contains a basketball court, four racquetball courts, a weight room, a billiard and ping-pong room, and a multipurpose room that is used for areobics, dancing and fencing. Tr. 837 (Brewer).

2. VMI, on the other hand, has eight tennis courts; an NCAA competition level indoor track and field facility; a number of multi-purpose fields; baseball, soccer and lacross fields; an obstacle course; large boxing, wrestling and martial arts facilities; an 11-laps-to-the-mile indoor running course; an indoor pool; indoor and outdoor rifle ranges; and a football stadium that also contains a practice field and outdoor track. Tr. 839, Tr. 840 (Brewer).

3. Mary Baldwin's basketball court, similar to a high school gym, seats approximately 400-500. VMI has four basketball courts, including one facility that contains television hook-up capability and seats approximately 5,000. Tr. 838 (Brewer).

4. VMI's weight room has twice the number of stations and is probably between three and four times

the size of the weight room at Mary Baldwin. Tr. 839 (Brewer).

D. *Academic Programs*

1. VMI offers undergraduate degrees in liberal arts, the sciences and engineering. Stip. 115. VMI has one of only five engineering programs in the Commonwealth of Virginia that are accredited by the Accreditation Board of Engineering and Technology, Inc. Stip. 117.

2. Mary Baldwin College does not offer a bachelor of science degree. Tr. 156 (Lott). Mary Baldwin College does not offer engineering on campus. Tr. 157 (Lott). MBC does not have a math and science focus; only about 15% of all current MBC students major in math or science. Tr. 157, Tr. 158 (Lott). VWIL students who wish to earn a degree in engineering must travel to Washington University in St. Louis, Missouri to obtain it. Tr. 101, 157 (Lott).

3. VWIL students interested in obtaining an engineering degree through the cooperative program with Washington University would not receive the tuition discount during their two years in St. Louis; they would have to pay the private tuition fees that are required and thus would be denied the opportunity to receive an engineering degree on a publicly-supported basis like VMI students. Tr. 696, Tr. 697 (Sgro).

APPENDIX C

SUPREME COURT OF THE UNITED STATES OF AMERICA

No. 92-1213

VIRGINIA MILITARY INSTITUTE, ET AL., PETITIONERS

v.

UNITED STATES

Case below, *United States v. Com. of Va.*, 766 F. Supp. 1407; 976 F.2d 890.

On petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

May 24, 1993. The petition for a writ of certiorari is denied.

Opinion of Justice SCALIA respecting the denial of the petition for writ of certiorari.

Whether it is constitutional for a State to have a men-only military school is an issue that should receive the attention of this Court before, rather than after, a national institution as venerable as the Virginia Military Institute is compelled to transform itself. This present petition, however, seeks our intervention before the litigation below has come to final judgment. The Court of Appeals vacated the judgment that had been entered in favor of petitioners, and remanded the case to the District Court for determination of an appropriate remedy. It expressly declined to rule on the "specific remedial course that the Commonwealth should or must follow hereafter," and suggested permissible remedies other than compelling the Virginia Military Institute to abandon its current admissions policy. *United States v. Virginia*, 976 F.2d 890, 900 (CA4 1992).

We generally await final judgment in the lower courts before exercising our certiorari jurisdiction. See, *e.g.*, *American Construction Co. v. Jacksonville, T & K.W.R. Co.*, 148 U.S. 372, 384, 13 S.Ct. 758, 763, 37 L.Ed. 486 (1893); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328, 88 S.Ct. 437, 438, 19 L.Ed.2d 560 (1967) (*per curiam*); see generally R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 4.18, pp. 224-226 (6th ed. 1986). I think it prudent to take that course here. Our action does not, of course, preclude VMI from raising the same issues in a later petition, after final judgment has been rendered. See, *e.g.*, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-259, 36 S.Ct. 269, 271-272, 60 L.Ed. 629 (1916); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365-366, n. 1, 93 S.Ct. 647, 650, n. 1, 34 L.Ed.2d 577 (1973); Stern, Gressman, & Shapiro, *supra*, § 4.18, at 226; 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4036, p. 32 (2d ed. 1988).

Justice THOMAS took no part in the consideration or decision of this petition.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-1690

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

COMMONWEALTH OF VIRGINIA; LAWRENCE DOUGLAS WILDER, Governor of the Commonwealth of Virginia; VIRGINIA MILITARY INSTITUTE; JOSEPH M. SPIVEY, III, President of the Virginia Military Institute Board of Visitors; JOHN WILLIAMS KNAPP, Superintendent of Virginia Military Institute; THE BOARD OF VISITORS OF VIRGINIA MILITARY INSTITUTE; THOMAS N. DOWNING; ELIZABETH P. HOISINGTON, BRIG. GEN.; ROBERT Q. MARSTON; A. COURTLAND SPOTTS, III; DANIEL F. FLOWERS; B. POWELL HARRISON, JR.; ROBERT H. SPILMAN; SAMUEL E. WOOLWINE; JAMES W. ENOCHS, JR.; WILLIAM A. HAZEL; HARVEY S. SADOW; DOUGLAS K. BAUMGARTNER; DANIEL D. CAMERON; GLEN N. JONES; JOHN W. ROBERTS, Members of the Board of Visitors of Virginia Military Institute; VMI FOUNDATION, INCORPORATED; VMI ALUMNI ASSOCIATION, DEFENDANTS-APPELLEES

and

GORDON K. DAVIES, Director of the Virginia State Council of Higher Education; THE VIRGINIA STATE COUNCIL OF HIGHER EDUCATION and its Members and Officers, DEFENDANTS

VIRGINIA WOMEN ATTORNEYS ASSOCIATION; VIRGINIA CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; VIRGINIA CHAPTER OF THE OLDER WOMEN'S LEAGUE; VIRGINIA FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INCORPORATED; FRIENDS OF VMI FOR EQUALITY; ALEXANDER W. ASTIN; AMERICAN CIVIL LIBERTIES UNION; ACLU FOUNDATION OF VIRGINIA; NATIONAL WOMEN'S LAW CENTER; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; CENTER FOR WOMEN POLICY STUDIES; NATIONAL ORGANIZATION FOR WOMEN; NOW LEGAL DEFENSE AND EDUCATION FUND; VIRGINIA NATIONAL ORGANIZATION FOR WOMEN; VIRGINIA NOW LEGAL DEFENSE AND EDUCATION FUND, INCORPORATED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND, AMICI CURIAE

Argued Apr. 8, 1992

Decided Oct. 5, 1992

On Petition for Rehearing with Suggestion for Rehearing In Banc Nov. 19, 1992

Before PHILLIPS and NIEMEYER, Circuit Judges, and WARD, Senior District Judge for the Middle District of North Carolina, sitting by designation.

OPINION

NIEMEYER, Circuit Judge:

The male-only admissions policy of Virginia Military Institute (VMI), a state institution of higher education located in Lexington, Virginia, is challenged by the federal government under the Equal Protection Clause of the Fourteenth Amendment and the jurisprudence of *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Fd.2d 1090 (1982). The government contends that the school's policy discriminates against women and is not substantially related to the achievement of an important governmental objective.

Following a six-day trial and extensive findings of fact, the district court concluded that VMI's male-only policy "is fully justified" by a generally accepted benefit of single-sex education, and that the admission of women would "significantly" change the "methods of instruction and living conditions" at VMI. Having concluded that "diversity in education" was a legitimate state interest, the district court summarized, "I find that both VMI's single-sex status and its distinctive educational method represent legitimate contributions to diversity in the Virginia higher education system, and that excluding women is substantially related to this mission." 766 F.Supp. 1407, 1411-13 (W.D.Va.1991).

The United States contends on appeal that enhancing diversity by offering a distinctive single-sex education to men only is not a legitimate state objective and that the Commonwealth and VMI have not established a sufficient justification for VMI's male-only admissions policy.

For the reasons that we give more fully below, we accept the district court's factual determinations that VMI's unique methodology justifies a single-gender policy and material aspects of its essentially holistic system would be substantially changed by co-education. Moreover, all parties appear to acknowledge, as did the district court, the positive and unique aspects of the program. The Commonwealth of Virginia has not, however, advanced any state policy by which it can justify its determination, under an annouced policy of diversity, to afford VMI's unique type of program to men and not to women.

Because Virginia has failed to articulate an important objective which supports the provision of this unique educational opportunity to men only, we vacate the judgment of the district court and remand the case to the district court to require the Commonwealth of Virginia to formulate, adopt, and implement a plan that conforms to the principles of equal protection discussed herein. We do not, however, order that women be admitted to VMI if adequate alternatives are available.

I

VMI was established by the Virginia legislature in 1839 as a four-year military college, and its graduates have distinguished themselves in the 150 years since. A VMI professor, Thomas "Stonewall" Jackson, achieved notoriety as a confederate general during the Civil War. The VMI cadet corps fought Union troops at New Market, Virginia, and almost 1800 almuni (constituting 94% of all VMI graduates at the time) fought in the Civil War. Among the thousands of alumni who have served this country during

war is General of the Army George C. Marshall, and six have been awarded the Congressional Medal of Honor. VMI graduates have achieved similarly in civilian life. The school's success and reputation are uncontroverted in this case. Indeed, it is apparently that very success in producing leaders that has made admission to VMI desirable to some women, prompting the government to challenge the policy of excluding women.

VMI is financially supported by the Commonwealth of Virginia and remains "subject to the control of the [Virginia] General Assembly." Va.Code Ann. § 23-92. It is governed by a Board of Visitors, which the Commonwealth expressly charges with prescribing "the terms upon which cadets may be admitted, their number, the course of their instruction, the nature of their service, and the duration thereof." Va.Code Ann. § 23-104.

The 15 state-supported institutions of higher learning in Virginia,[1] including VMI, are generally supervised and coordinated by the State Council of Higher Education for Virginia. While the Virginia General Assembly assigns various responsibilities to the Council of Higher Education, including the responsibility "to review and approve or disapprove of any proposed change in [an existing institution's] statement of mission," it delegates to each institution the right

[1] In addition to VMI, the list includes: Christopher Newport College, Clinch Valley College, The College of William and Mary, George Mason University, James Madison University, Longwood College, Mary Washington College, Norfolk State University, Old Dominion University, Radford University, University of Virginia, Virginia Commonwealth University, Virginia Polytechnic Institute and State University, and Virginia State University.

to modify its mission and to establish admissions criteria. *See* Va.Code Ann. § 23-9.6:1(2).

The mission of VMI is to produce "citizen-soldiers, educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary."[2] Focusing primarly on character development and leadership training through a unique and intense process, characterized as an "adversative" educational model drawn from earlier military training and English public schools, VMI's educational method emphasizes physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of values. The process is designed to foster in VMI cadets doubts about previous beliefs and experiences and to instill in cadets new values which VMI seeks to impart. The model employs a hostile, spartan environment that is characterized by six in-

[2] As stated in the final report of the Mission Study Committee of the VMI Board of Visitors, dated May 16, 1986:

> The Virginia Military Institute believes that the measure of a college lies in the quality and performance of its graduates and their contributions to society.
>
> Therefore, it is the mission of the Virginia Military Institute to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American Democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril.
>
> To accomplish this result, the Virginia Military Institute shall provide to qualified young men undergraduate education of highest quality—embracing engineering, science, and the arts—conducted in, and facilitated by, the unique VMI system of military discipline.

terrelated components—the "rat line," the class system, the "dyke" system, the honor code, the barracks life, and the military system.

The *rat line* refers to the harsh orientation process to which all new cadets ("rats") are subjected during their first seven months at VMI. Designed to be comparable to the Marine Corps' boot camp in terms of physical rigor and mental stress, the rat line includes indoctrination, minute regulation of individual behavior, frequent punishments, rigorous physical education, and military drills. The *class system* entails the peer assignment of privileges and responsibilities, including supervisory roles, to classes of cadets based on rank. The *dyke system*, which is "closely linked" with the rat line, assigns each rat to a first classman, who acts as a mentor ("dyke") to relieve some of the stress generated from the rat line. The dyke system aims to create cross-class bonding and provide a model for leadership and support. The *honor code*, that a cadet "does not lie, cheat, steal nor tolerate those who do," is a stringently enforced code of conduct applying to all aspects of life at VMI and providing the single penalty of expulsion for its violation. The *barracks life*, described as important to VMI's ethos of egalitarianism, is dictated by the nature and functioning of the barracks. Each class is assigned to one floor of the four-story barracks structure and three to five cadets are assigned to a room. The rooms are stark and unattractive. There are no locks on the doors and windows are uncovered. Access to bathrooms is provided by outside corridors visible to the quadrangle, and there is a total lack of privacy in the barracks, where cadets are subjected to constant scrutiny and minute regulation, all intended to foster cadet equality and to induce

stress. Finally, the *military system*, providing regulation, etiquette, and drill, pervades life at VMI. As part of the military system each cadet must participate in an ROTC program throughout his four years. The district court found that the various systems in place at VMI are integrated and interdependent, and several of them cannot be changed without materially affecting others.

VMI, with approximately 1,300 male students, has never accepted applications from women. During the two years preceding the filing of this action, it did, however, receive over 300 inquiries from women. Today, VMI is the only state-supported, single-sex college in Virginia, although historically most of Virginia's 15 public colleges were at one time single-sex institutions.

The government instituted this action on March 1, 1990, under Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, on behalf of a female high school student who desired admission to VMI, contending that VMI's male-only admissions policy violates the Equal Protection Clause of the Fourteenth Amendment. The suit named as defendants the Commonwealth of Virginia; its governor, Lawrence Douglas Wilder; VMI and its Board of Visitors and top officers; and the State Council of Higher Education for Virginia, its members and its Director.[3] The action sought an order enjoining discrimination based on sex and requiring the defendants "to formulate, adopt, and fully and timely implement a plan to remedy fully their discriminatory policies and practices."

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[3] The VMI Foundation, Inc., and the VMI Alumni Association, neither of which is a state agency, were allowed to participate in the litigation as intervenors.

In his answer to the complaint, Governor Wilder stated that "the failure to admit females to [VMI] is against his personal philosophy," and "no person should be denied admittance to a state supported school because of his or her gender." On his assurance that he would "abide by the decision of the Court," Governor Wilder was given permission not to participate in the litigation.

As the result of Governor Wilder's position and because of the conflict between the Governor, the Commonwealth, and VMI, the Attorney General of Virginia was granted leave to withdraw from representation of any party. She stated in a letter to the Governor,

> You have indicated that VMI's admission policy serves no legitimate public policy objective. . . . In the absence of a statute explicitly expressing the General Assembly's view on the policy issue, your statement of the Commonwealth policy is persuasive.

As a result, the Commonwealth obtained *pro bono* counsel, who then sought and obtained on behalf of the Commonwealth a stay of proceedings against it during the liability phase of litigation, on the condition that it abide by the court's liability determination. Accordingly, the Governor and the Commonwealth did not participate in the liability determinations, which by agreement include this appeal.

II.

The district court began its opinion by noting that in May 1864, during the Civil War, VMI cadets bravely fought Union troops at New Market, Virginia. The court continued, "the combatants have

again confronted each other, but this time the venue is in this court." What was not said is that the outcome of each confrontation finds resolution in the Equal Protection Clause. When the Civil War was over, to assure the abolition of slavery and the federal government's supervision over that policy, *all* states, north and south, yielded substantial sovereignty to the federal government in the ratification of the Fourteenth Amendment, and every state for the first time was expressly directed by federal authority not to deny any *person* within the state's jurisdiction "equal protection of the laws." U.S. Const. amend. XIV, § 1. The government now relies on this clause to attack VMI's admissions policy.

The obvious appeal to fairness in requiring the equal application of law too often becomes entangled with generalized notions of equality as referred to in Lincoln's Gettysburg Address [4] and, before that, the Declaration of Independence,[5] and these generalizations tend to overwhelm the difficult task of deciding what is meant by equal protection. We recognize that all persons are in many important respects different and that they were created with differences, and it is not the goal of the Equal Protection Clause to attempt to make them the same. To apply law to different persons with a mind toward making them the same might result, among other things, in the unequal application of the law. Thus, no one suggests that equal protection of the laws requires that

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[4] "Four score and seven years ago, our fathers brought forth upon this continent a new nation, conceived in liberty and dedicated to the proposition that *all men are created equal.*"

[5] "We hold these Truths to be self-evident, that *all Men are created equal.*"

all laws apply to all persons without regard to actual differences. *See Jenness v. Fortson*, 403 U.S. 431, 442, 91 S.Ct. 1970, 1976, 29 L.Ed.2d 554 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were actually alike. . . .").

Thus, although it is established that the Fourteenth Amendment "does not deny to States the power to treat different classes of persons in different ways," *Reed v. Reed*, 404 U.S. 71, 75, 92 S.Ct. 251, 253, 30 L.Ed.2d 225 (1971), when a state regulation employs classifications, the defining criteria must have a "fair and substantial relation" to the objective of the regulation. *Id.* at 76, 92 S.Ct. at 254. An equal protection analysis, therefore, must determine initially whether the class of persons to which a state regulation applies is defined in a manner that fairly and substantially relates the class to the purpose of the regulation. But the appropriate inquiry cannot end there. To protect against unlawful discrimination the analysis must also address whether the regulation, itself, serves an adequate governmental purpose.

Because almost every action taken by the state can be characterized as involving some form of classification, ranging from the benign to the invidious, different sorts of classifications have led to different levels of scrutiny. A classification based on race or national origin or which affects fundamental rights secured by the Constitution, because it is deemed to be inherently suspect, is examined most closely and is justified only by a necessary relationship to a compelling state interest. *See, e.g., Palmore v. Sidoti*, 466 U.S. 429, 432-33, 104 S.Ct. 1879, 1881-82, 80 L.Ed.2d 421 (1984) (racial classification). On the

other hand, other classifications, based, for example, on economic factors, need only be rationally related to a legitimate governmental interest. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-40, 105 S.Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985). A classification based on sex requires some scrutiny more focused than that for economic classification. While classification by sex is not subjected to the same strict scrutiny as are classifications by race and national origin or which affect fundamental rights, the Supreme Court has developed an intermediate level of review for gender-based classifications. "To withstand intermediate scrutiny, a statutory classification must be substantially related to an *important governmental objective*." *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 1914, 100 L.Ed.2d 465 (1988) (emphasis added); *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982).

Accordingly, to conduct the appropriate Fourteenth Amendment analysis in this case, we must determine whether the state policy of excluding women from admission to VMI is substantially related to an important policy or objective of Virginia.

III

VMI argues that its own admissions policy is the state's policy because the admissions policy is by statute delegated to each state institution. The code provisions establishing VMI provide that its Board of Visitors "shall prescribe the terms upon which cadets may be admitted, their number, the course of their instruction, the nature of their service, and the duration thereof." Va.Code Ann. § 23-104. And this delegation of admissions policy-making is confirmed

by the language of a Va.Code Ann. § 23-9.6:1(2), which provides that the Council of Higher Education is not empowered to affect "the standards and criteria for admission of any public institution, whether related to academic standards, residence or other criteria, it being the intention of this section that . . . student admission policies shall remain a function of the individual institutions." VMI thus contends that its admissions policy becomes the state policy so that, as its admissions policy is justified by the mission of developing citizen soldiers, a legitimate and important state purpose is served.

To address VMI's argument, we must first decide whether VMI's male-only admissions policy, maintained pursuant to state-delegated authority, is a classification justified by a fair and substantial relationship with the institution's mission of developing citizen soldiers, and this in turn leads to an examination of whether VMI's mission would be materially altered by the admisison of women.

Much of the debate between the parties relates to the physiological differences between men and women and the question of a woman's ability to perform and endure the physical training included in VMI's program. While it is agreed by the parties that *some* women can meet the physical standards now imposed on men, it is also agreed that a smaller percentage of women can do so. Based on evidence about the experience of the service academies and the Marine Corps, the district court was justified in finding that if women were to be admitted, VMI would have to convert to a dual-track physical training program in order to subject women to a program equal in effect to that of men, and that, as found by a study conducted at West Point, cadets of both sexes would

nevertheless perceive the treatment of them as unequal, leading to jealousy and resentment.

All the parties also agree that men and women would and should be entitled to some degree of privacy, at least to the extent that men and women not, in all respects, be exposed to each other. While again there was much debate among the parties as to the changes that might be required to accommodate this at VMI with the admission of women, all agreed that some accommodation would be necessary.

Finally, the parties have debated extensively the effect of cross-sexual confrontations that the adversative program would produce. Testimony was received that the deliberate harassment that upperclassmen give to "rats" would play out differently when the upperclassman is of one sex and the "rat" another. While the government attributed the predicted effect of this as stereotyping, the evidence supported the district court's finding that cross-sexual confrontation and interaction introduces additional elements of stress and distraction which are not accommodated by VMI's methodology. The court relied on testimony by experts and similar such observations made in the West Point study.

The sum of the changes that could be expected prompted the district court to conclude that if VMI became coeducational, it would offer "neither males nor females the VMI education that now exists." The court observed that "equal treatment would necessarily give way to fair treatment, thus undermining egalitarianism," which is a critical characteristic that now pervades several aspects of VMI's methodology. And the record supports the district court's findings that at least these three aspects of VMI's program—physical training, the absence of

privacy, and the adversative approach—would be materially affected by coeducation, leading to a substantial change in the egalitarian ethos that is a critical aspect of VMI's training.

The district court's conclusions that VMI's mission can be accomplished only in a single-gender environment and that changes necessary to accommodate coeducation would tear at the fabric of VMI's unique methodology are adequately supported. And the district court was not clearly erroneous in concluding that if a court were to require the admission of women to VMI to give them access to this unique methodology, the decision would deny those women the very opportunity they sought because the unique characteristics of VMI's program would be destroyed by coeducation. The Catch-22 [6] is that women are denied the opportunity when excluded from VMI and cannot be given the opportunity by admitting them, because the change caused by their admission would destroy the opportunity.

It is not the maleness, as distinguished from femaleness, that provides justification for the program. It is the homogeneity of gender in the process, regardless of which sex is considered, that has been shown to be related to the essence of the education and training at VMI.

The argument by the government that VMI's existing program is maintained as the result of impermissible stereotyping and overly broad generalizations, without a more detailed analysis, might lead, if accepted, to a finding that would impose a conformity

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[6] From the paradoxical rule found in the novel, *Catch-22*, by Joseph Heller (1961).

that common experience rejects. Men and women are different, and our knowledge about the differences, physiological and psychological, is becoming increasingly more sophisticated. Indeed the evidence in this case amply demonstrated that single-genderedness in education can be pedagogically justifiable.

For instance, in a ten-year empirical study reported by Alexander W. Astin in *Four Critical Years: Effects of College on Beliefs, Attitudes, and Knowledge* (San Francisco: Jossey-Bass 1977), it was found that single-sex colleges have advantages over coeducational colleges in numerous areas. A summary of the report provided by the parties in this case states:

> Single-sex colleges show a pattern of effects on both sexes that is almost uniformly positive. Students of both sexes become more academically involved, interact with faculty frequently, show large increases in intellectual self-esteem, and are more satisfied with practically all aspects of college experience (the sole exception is social life) compared with their counterparts in coeducational institutions.

J.A. 1830. In addition to providing substantial benefits to college students, single-sex education also has been found to have salutary consequences for sexual equality in the job market. In a study conducted by Marvin Bressler and Peter Wendell, *The Sex Composition of Selective Colleges and Gender Differences in Career Aspirations*, 51 J. Higher Educ. 650, 662 (1980), the authors observed that in single-sex colleges, the students were more likely to set aside initial, stereotypical job aspirations in favor of more sex-neutral aspirations. They concluded from their data,

> The available evidence thus fails to support the hypothesis that coeducation is a useful instrument for altering the imbalance in career aspirations of academically superior men and women undergraduates.
>
> * * * *
>
> [I]f all selective residential colleges reverted to single sex status, a notable fraction of all men and an even larger proportion of all women would probably renounce initial career commitments, a development which would have salutary consequences for sexual equality in the job market.

The experts for both sides in this case appear to agree with the conclusions reached in these studies.

Thus, while the data support a pedagogical justification for a single-sex education, they do not materially favor either sex. Both men *and* women appear to have benefited from single-sex education in a materially similar manner. The evidence about the VMI system suggests no differently. The problems that could be anticipated by coeducation at VMI, which are suggested by VMI generally arise from physiological differences between men and women, needs for privacy, and cross-sexual confrontations, would not be anticipated in an all-female program with the same mission and methodology as that of VMI.[7]

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[7] We do not intend to imply that separate, single-sex institutions or programs are "equal" to coeducational ones for equal protection purposes. But, to the contrary, the data suggest that *differences* between a single-gender student population and a coeducational one justify a state's offering single-gender education.

In summary, the record supports the conclusion that single-sex education is pedagogically justifiable, and VMI's system, which the district court found to include a holistic formula of training, even more so. It is not remarkable therefore that the government in its brief conceded, "[I]t is not our position that the Fourteenth Amendment embodies a per se bar to public single-sex education."

IV

While this conclusion answers the question of whether VMI's male-only policy is justified by its institutional mission, the argument does not answer the larger question of whether the unique benefit offered by VMI's type of education can be denied to women by the state under a policy of diversity, which has been advanced as the justification and which was relied on by the district court.

The parties agree that VMI offers a unique combination of education and training that makes a positive contribution offered by no other institution.[8] And the district court found, apparently without exception from any party, that "VMI's military program is absolutely unique. No other school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI." The decisive question in this case therefore

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[8] At one point VMI suggested that a similar educational opportunity was provided to women by the program at Virginia Polytechnical Institute and State University. It has not pressed that point and in its brief confirms that VMI's program is "unique and remarkably successful." Similarly the government characterized VMI's program as "distinctive" and "not available anywhere else in Virginia."

transforms to one of why the Commonwealth of Virginia offers the opportunity only to men. While VMI's institutional mission justifies a single-sex program, the Commonwealth of Virginia has not revealed a policy that explains why it offers the unique benefit of VMI's type of education and training to men and not to women. Although it is readily apparent from the evidence that the rigor of the physical training at VMI is tailored to males, in the context of a single-sex female institution, it could be adjusted without detrimental effect. No other aspect of the program has been shown to depend upon maleness rather than single-genderedness.

Virginia has committed the development of its educational policy in the first instance to the State Council of Higher Education for Virginia, but affords each institution of higher learning significant autonomy. *See* Va.Code Ann. § 23-9.6:1. Moreover, a specific statute reserves control over VMI in the General Assembly. *See* Va.Code Ann. § 23-92. To oversee and coordinate the several state-supported institutions of higher education, however, the Council of Higher Education is charged with the responsibility of preparing plans, which it has done biennially. These plans articulate "access, excellence and accountability" as an overriding goal of Virginia's system of higher education, and they reaffirm a policy of *autonomy and diversity* to provide a variety of choice. The Council's plans also urged a continuing effort of coordination among the state's public and private institutions to avoid duplication and expense.

Announcing a similar policy, a special commission legislatively established to chart the future goals of higher education in Virginia, the Commission on the University of the 21st Century, reported to the Governor and the General Assembly of Virginia in 1990 that the hallmarks of Virginia higher education, "autonomy and diversity," should be maintained. Within its report, the Commission indirectly reaffirmed the earlier stated policy of affording broad access to higher education in Virginia, and also observed:

> Because colleges and universities provide opportunities for students to develop values and learn from role models, it is extremely important that they deal with faculty, staff, and students *without regard to sex, race, or ethnic origin.*

(Emphasis added.) That statement is the only explicit one that we have found in the record in which the Commonwealth has expressed itself with respect to gender distinctions. Our inability to find a stated policy justifying single-sex education in state-supported colleges and universities is confirmed by the Virginia Attorney General's statement about the absence of such a state policy: "In the *absence* of a statute explicity expressing the General Assembly's view on the policy issue, [the Governor's] statement of the Commonwealth's policy [that 'no person should be denied admittance to a State supported school because of his or her gender'] is persuasive." (Emphasis added.)

The lack of a state-announced policy to justify gender classifications is aggravated by the reluctance of the Commonwealth, as a party, and its governor to participate in this case and in this appeal. To the extent that the Governor's view represents state policy, VMI's single-sex admissions policy violates state policy.

If VMI's male-only admissions policy is in furtherance of a state policy of "diversity," the explanation

of how the policy is furthered by affording a unique educational benefit only to males is lacking. A policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender. Moreover, if responsibility for implementing diversity has somehow been delegated to an individual institution, no explanation is apparent as to how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions.

On a more empirical level, we have been given no explanation for the movement away from gender diversity in Virginia by public colleges and universities. At one time most of Virginia's institutions of higher learning were single-sex, including four all-female institutions. Today, all but VMI are coeducational. If VMI thus remains male in furtherance of the state's policy of diversity, which includes diversity in gender, did the decisions of the other institutions violate state policy by moving uniformly to coeducation? At most, VMI could argue that the policy of institutional autonomy in establishing admissions requirements produces a diversity by virtue of the individual random decisions of its 15 institutions. But that randomness has fortuitously resulted in 14 coeducational institutions and VMI, an all-male institution.

In short, VMI has adequately defended a single-gender education and training program to produce "citizen soldiers," but it has not adequately explained how the maintenance of one single-gender institution gives effect to, or establishes the existence of, the governmental objective advanced to support VMI's admissions policy, a desire for educational diversity.

V

We are thus left with three conclusions: (1) single-gender education, and VMI's program in particular, is justified by a legitimate and relevant institutional mission which favors neither sex; (2) the introduction of women at VMI will materially alter the very program in which women seek to partake; and (3) the Commonwealth of Virginia, despite its announced policy of diversity, has failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type of education to men and not to women.

Although neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women, the Commonwealth has elected, through delegation or inaction, to maintain a system of education which offers the program only to men. In the proceedings below, Virginia had the opportunity to meet its burden of demonstrating that it had made an important and meaningful distinction in perpetuating this condition. *See Kirchberg v. Feenstra*, 450 U.S. 455, 461, 101 S.Ct. 1195, 1199, 67 L.Ed.2d 428 (1981). As the record stands, however, evidence of a legitimate and substantial state purpose is lacking.

In light of our conclusions and the generally recognized benefit that VMI provides, we do not order that women be admitted to VMI if alternatives are available. But VMI's continued status as a state institution is conditioned on the Commonwealth's satisfactorily addressing the findings we affirm and bringing the circumstances into conformity with the Equal Protection Clause of the Fourteenth Amendment. By

commenting on the potential benefits of single-gender education while discussing the alleged governmental interest in support of VMI's admissions policies, we do not mean to suggest the specific remedial course that the Commonwealth should or must follow hereafter. Rather, we remand the case to the district court to give to the Commonwealth the responsibility to select a course it chooses, so long as the guarantees of the Fourteenth Amendment are satisfied. Consistent therewith, the Commonwealth might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution. While it is not ours to determine, there might be other more creative options or combinations.

Accordingly, we vacate the judgment and remand the case to the district court: (1) to require the defendants to formulate, adopt, and implement a plan that conforms with the Equal Protection Clause of the Fourteenth Amendment, (2) to establish appropriate timetables, and (3) to oversee the implementation of the plan.

VACATED AND REMANDED FOR FURTHER PROCEEDINGS.

On Petition for Rehearing with Suggestion for Rehearing In Banc

Nov. 19, 1992

Appellees filed a petition for rehearing with suggestion for rehearing in banc and appellant filed an answer to the petition. A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Widener and Hamilton voted to rehear the case in banc, and Chief Judge Ervin and Judges Russell, Hall, Phillips, Murnaghan, Wilkins, Niemeyer, and Williams voted to deny a rehearing in banc. Judges Wilkinson and Luttig did not participate in the decision.

The original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Niemeyer, with the concurrence of Judge Phillips and Judge Ward, Senior United States District Judge sitting by designation.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civ. A. No. 90-0126-R

UNITED STATES OF AMERICA, PLAINTIFF

v.

COMMONWEALTH OF VIRGINIA, ET AL., DEFENDANTS

June 14, 1991

MEMORANDUM OPINION [1]

KISER, District Judge.

The Controversy

It was in May of 1864 that the United States and the Virginia Military Institute (VMI) first confronted each other. That was a life-and-death engagement that occurred on the battlefield at New Market, Virginia. The combatants have again confronted each other, but this time the venue is in this court. Nonetheless, VMI claims the struggle is nothing short of a life-and-death confrontation—albeit figurative.

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[1] Detailed findings of fact are set forth in the Appendix to this Memorandum Opinion, portions of which will be referred to throughout the Opinion.

The conflict between the parties arises out of the United States' challenge to VMI's all-male admissions policy. The United States asserts that as a state-supported college, VMI's refusal to admit females to the Institute, regardles of their qualifications, violates the Equal Protection Clause of the Fourteenth Amendment. VMI counters by saying that although it discriminates against women, the discrimination is not invidious but rather to promote a legitimate state interest—diversity in education. Thus, the issue to be resolved is whether VMI's practice of excluding women can pass muster under the equal protection clause, as glossed by the decisions of the Supreme Court. I find that it can, for the reasons that I hereafter state.

Jurisdiction

This Court's jurisdiction was properly invoked under Title IV of the Civil Rights Act, 42 U.S.C. § 2000c-6, which permits the United States to bring actions alleging discrimination in violation of either the United States Constitution or other federal statutes.

Because single-sex colleges and single-sex military schools are exmpted from Title IX of the Civil Rights Act, 20 U.S.C. 1681(a)(4) and (5), the United States alleged only a constitutional violation and no statutory violation. The Department of Justice's authority to bring a suit under Title IV is not limited by Title IX. *United States v. Massachusetts Maritime Academy*, 762 F.2d 142, 147-51 (1st Cir.1985). Of course, although Congress could deprive the Attorney General of the authority to bring this action, it could not pass a statute that would exempt VMI's alleged equal protection violations from judicial re-

view. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 733, 102 S.Ct. 3331, 3340, 73 L.Ed.2d 1090 (1982).

Procedural Background

This case originated from a complaint filed by the United States Department of Justice on behalf of a female high school student who wanted to be considered for admission to VMI. The named defendants were the Commonwealth of Virginia; Governor Lawrence Douglas Wilder; Virginia Military Institute, its president, superintendent, and members of its Board of Visitors; and Virginia's State Council of Higher Education and its members. The State Council of Higher Education and its members have been dismissed from the suit. The Commonwealth has been granted a stay relieving it of the duty to appear at trial, under the condition that it be bound by any ruling of this Court. Governor Wilder was relieved of the duty to respond to any subpoenas requiring him to testify at trial. In response to an earlier motion, he stated that he did not oppose entry of summary judgment against himself and the other defendants. The VMI Foundation and the VMI Alumni Association, private organizations associated with VMI, have intervened as defendants in the case over the United States' objection. *See* ruling of November 27, 1990.

A six-day trial was held beginning April 4, 1991. Nineteen witnesses testified, including four experts on education, one expert on college facilities, and one expert on human physiology. All defendants, except Governor Wilder, were represented by common counsel. Governor Wilder was represented by counsel, but

he did not personally appear or participate in the trial.

Standard of Review

The VMI Board of Visitors decides the admissions policy of VMI. The seventeen members of this Board are appointed by the Governor of Virginia, subject to approval by the General Assembly, including the State Adjutant General, who is a member *ex officio*. Va.Code § 23-93; Va.Code § 44-11 (Adjutant General also nominated by Governor subject to General Assembly approval). Twelve of the members must be VMI alumni.

All parties recognize that this case concerns educational policy, and the proper standard of review should be derived from cases concerning higher education. The principle of academic freedom, an aspect of the freedom of association guaranteed by the First Amendment, has been recognized by the Supreme Court as a reason to defer to academic decisionmaking by a university. *Regents of the University of California v. Bakke*, 438 U.S. 265, 312, 98 S.Ct. 2733, 2759, 57 L.Ed.2d 750 (1978).[2] The essential freedoms of a university include the freedom to choose who may be admitted to study. *Id.* (Quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 77 S.Ct. 1203, 1218, 1 L.Ed.2d 1311 (1957) (Justice Frankfurter concurring)). "[A]ttainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education." *Id.*

[2] However, this is not the same degree of deference as is accorded Congress in matters of national defense. *See Rostker v. Goldberg*, 453 U.S. 57, 64-67, 101 S.Ct. 2646, 2651-53, 69 L.Ed.2d 478 (1981).

While *Bakke* involved diversity within a single graduate program,[3] other courts have extended the rationale of that decision to include the freedom to create different missions at different state universities, in order to promote diverse educational opportunities within the state. *Williams v. McNair*, 316 F.Supp. 134, 137 (D.S.C.1970) (three-judge panel), *aff'd*, 401 U.S. 951, 91 S.Ct. 976, 28 L.Ed. 235 (1971) (per curiam); *Ayers v. Allain*, 914 F.2d 676, 687 (5th Cir.1990 *en banc*), *cert. granted sub nom. United States v. Mabus*, —— U.S. ——, 111 S.Ct. 1579, 113 L.Ed.2d 644 (1991).

However, deference to university decisions is not absolute. The Supreme Court ordered racial integration of graduate programs long before it ordered desegregation of lower public schools. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938); *Sipuel v. Board of Regents*, 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. 247 (1948); *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950). Courts have, in some cases, entered injunctions that have the effect of overruling discretionary educational decisions of individual colleges, where those decisions tend to perpetuate unconstitutional discrimination. In *Norris v. State Council of Higher Education*, 327 F.Supp. 1368 (4th Cir.), *aff'd*, 404

[3] In *Bakke*, the University of California attained racial diversity by reserving a number of openings in its medical school for minorities. Because of that quota system, Bakke was denied admission. It seems to me that a policy does not differ in principle, but only in degree of restrictiveness, from a policy which totally restricts admission of an identifiable class.

U.S. 907, 92 S.Ct. 227, 30 L.Ed.2d 180 (1971), a three-judge panel of the Fourth Circuit entered an injunction preventing Richard Bland College, a two-year branch of the College of William and Mary, from expanding into a four-year college, because that would have impeded desegregation of nearby Virginia State College.

Sex Discrimination

The first court challenge to sex segregation in Virginia higher education appeared in *Kirstein v. Rector and Visitors of the University of Virginia*, 309 F. Supp. 184 (E.D.Va.1970) (three-judge panel) (approving consent order). In that case, the court found that "we think it fair to say from the evidence that the most prestigious institution of higher education in Virginia is the University of Virginia in Charlottesville." *Id.* at 186. The court was reluctant to "interfere with the internal operation of any Virginia college or university," but it encouraged a settlement that required the university to admit women. But the court refused to enter an order requiring Virginia to admit both sexes to all of its universities:

> We are urged to go further and to hold that Virginia may not operate any educational institution separated according to the sexes. We decline to do so. Obvious problems beyond our capacity to decide on this record readily occur. One of Virginia's educational institutions is military in character. Are women to be admitted on an equal basis, and, if so, are they to wear uniforms and be taught to bear arms?

Id. at 187.

Another early Fourth Circuit decision, affirmed by the Supreme Court, involved Winthrop College in Rock Hill, South Carolina. *Williams v. McNair, supra.* In that case, male students wanted to attend an all-female college. The Court noted that South Carolina had one public all-male college (The Citadel, which like VMI offers a military program), and several co-educational institutions. The court noted,

> It is conceded that recognized pedagogical opinion is divided on the wisdom of maintaining "single-sex" institutions of higher education but it is stipulated that there is a respectable body of educators who believe that "a single-sex institution can advance the quality and effectiveness of its instruction by concentrating upon areas of primary interest to only one sex."

316 F.Supp. at 137. Unlike *Kirstein*, there was no feature of Winthrop College other than its single-sex status that made it distinctive, and the plaintiffs' interest in attending college in the town where they lived was found to be less than compelling. The denial of admission to them was not an equal protection violation.[4]

Hogan, supra, guides my decision in this case. In *Hogan*, the Supreme Court conducted a factual inquiry into the justification for the policy of the Mississippi University for Women of allowing men to audit courses in the nursing program, but not granting them

[4] This reasoning was adopted by Justice Powell in dissent in *Hogan*, 458 U.S. at 736, 102 S.Ct. at 3342 ("There is, of course, no constitutional right to attend a state-supported university in one's home town").

academic credit. It concluded that the policy denied equal protection to the plaintiff, who wished to earn credit for advanced nursing courses at the school.

The *Hogan* court applied the "intermediate scrutiny" test:

> [T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an exceedingly persuasive justification for the classification. The burden is met only by showing at least that the discrimination serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.

Hogan, 458 U.S. at 730, 102 S.Ct. at 3339 (citations and punctuation omitted).[5]

Where a state offers an educational opportunity to only one gender,

> The issue is not whether the benefitted class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.

Id. at 731 n. 17, 102 S.Ct. at 3340 n. 17. Finally,

[5] This is the "intermediate judicial scrutiny" test, now universally employed in sex discrimination cases based on the equal protection clause. The test originated in *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), and so had not been applied in *Kirstein* or *Williams*. G. Gunther, *Constitutional Law* 647 n. 3 (11th ed. 1985).

> [a]lthough the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.

Id. at 724-25, 102 S.Ct. at 3336.

Hogan involved admission of a single student into the nursing school, and the Court did not purport to extend its ruling to cover other programs at the school. *Id.* 458 U.S. at 733, 102 S.Ct. at 3340 (Chief Justice Burger dissenting). These determinations require a fact-intensive examination of the practical considerations underlying the challenged policy.

Many of the facts underlying the Supreme Court's rejection of the justification proferred in *Hogan* are not present here. In *Hogan*, Justice O'Connor's majority opinion emphasized that the

> uncontroverted record reveals that admitting men to nursing classes does not affect teaching style, . . . that the presence of men in the classroom would not affect the performance of the female nursing students, . . . and that men in coeducational nursing schools do not dominate the classroom. . . . In sum, the record in this case is flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of MUW's educational goals.

Hogan, 458 U.S. at 731, 102 S.Ct. at 3339.[6] The record in this case is directly to the contrary. The record is replete with testimony that single gender education at the undergraduate level is beneficial to both males and females. Moreover, the evidence establishes that key elements of the adversative VMI educational system, with its focus on barracks life, would be fundamentally altered, and the distinctive ends of the system would be thwarted, if VMI were forced to admit females and to make changes necessary to accommodate their needs and interests.

One of the most striking differences in the two cases is the reasons proffered to justify the discrimination. In *Hogan*, Mississippi maintained that a female-only admission policy at MUW was affirmative action which was justified to compensate women for past discrimination whereas, here, Virginia urges that a male-only admission policy at VMI promotes diversity within its statewide system of higher education. The Court found that Mississippi's proffered explanation failed both prongs of the intermediate scrutiny test, i.e., that it was not an important governmental objective and that the means of advancing the objective were not substantially related to the achievement of that objective. In contrast, diversity in education has been recognized both judicially and by education experts as being a legitimate objective. The sole way to attain single-gender diversity is to maintain a policy of admitting only one gender to an institution.

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[6] The procedural posture of *Hogan* at the Supreme Court may explain why the evidence was uncontroverted. Mississippi University for Women won at the district court level on summary judgment.

I also note that the plaintiff in *Hogan* was a resident of the town where Mississippi University for Women was located. He would have had no opportunity to study his chosen profession (nursing) within commuting distance of his home if he could not attend that school, and moving to a different community would have presented him with a significant hardship. *Id.* 458 U.S. at 735 n. 1, 102 S.Ct. at 3342 n. 1 (Justice Powell dissenting). VMI does not offer an advantage of close-to-home education to any students, male or female, because it requires all cadets to live on campus for all four years of college. Finding III.F.1. The night and Summer courses, which do serve commuting students, are open to both men and women. Findings I & III. Nor does its policy deny the opportunity to study any particular academic program to anyone, because all of the same courses, including military instruction, are available at VPI. Finding III.H.2.

Single-sex Education is a Constitutionally Legitimate Form of Diversity

A substantial body of "exceedingly persuasive" evidence supports VMI's contention that some students, both male and female, benefit from attending a single-sex college. Finding VII.B. For those students, the opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement. Finding VII.B.10. Astin, *Four Critical Years* (1977). Most importantly, Dr. Conrad, the United States' expert witness on higher education, called himself a "believer in single-sex education." Finding VII.B.7. He believed that single-sex education should be provided only by the private sector, because he also believes that

public institutions should be open to all citizens to the extent possible. He concedes that his public/private dichotomy is a personal, philosophical preference rather than one born of educational-benefit considerations. An opinion based on equity rather than appropriate educational methods is entitled to little weight. Finding VII.B.7.[7] *Rostker*, 453 U.S. at 79-81, 101 S.Ct. at 2659-60.

One empirical study in evidence, not questioned by an expert, demonstrates that single-sex colleges provide better educational experiences than coeducational institutions. Students of both sexes become more academically involved, interact with faculty frequently, show larger increases in intellectual self-esteem and are more satisfied with practically all aspects of college experience (the sole exception is social life) compared with their counterparts in coeducational institutions. Attendance at an all-male college substantially increases the likelihood that a student will carry out career plans in law, business and college teaching, and also has a substantial positive effect on starting salaries in business. Women's colleges increase the chances that those who attend will obtain positions of leadership, complete the baccalaureate degree, and aspire to higher degrees. Alexander Astin, *Four Critical Years*, (1977); VMI Ex. 731; Finding VII.B.10. This research was cited favorably by Justice Powell in his dissenting opinion in *Hogan*, 458 U.S. at 738-39, 102 S.Ct. at 3343-44.

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[7] VMI, like all of the colleges in Virginia, also has academic requirements for admission, including high school graduation, class rank, and Scholastic Aptitude Test performance, that effectively exclude many male candidates from the college. This kind of limitation on access apparently did not trouble Dr. Conrad.

Viewed in the light of this very substantial authority favoring single-sex education, the VMI Board's decision to maintain an all-male institution is fully justified even without taking into consideration the other unique features of VMI's method of teaching and training.

Openness and equal treatment by public institutions is a valid legislative goal, but legislators or other decisionmakers may also take other goals into account, even when adopting a policy that discriminates on the basis of sex. *Id.* The VMI Board has decided that providing a distinctive, single-sex educational opportunity is more important than providing an education equally available to all.

Effect of Coeducation at VMI

When one considers VMI's methods of education and the effect that admission of women into the institution will have, the Board's decision to remain an all-male institution is further reinforced. Expert testimony established that, even though some women are capable of all of the individual activities required of VMI cadets, a college where women are present would be significantly different from one where only men are present. This is true for a variety of reasons discussed more fully in the Findings of Fact. *See* Findings VIII.D-J. In addition to converting VMI from a single-gender institution to a coeducational institution, changes in methods of instruction and living conditions would occur.

As West Point's experience in converting to coeducation bears out, the presence of women would tend to distract male students from their studies. It would also increase pressures relating to dating, which would tend to impair the *esprit de corps* and

the egalitarian atmosphere which are critical elements of the VMI experience. Finding VIII.H.

Allowance for personal privacy would have to be made. Doors would have to be locked, and the windows on all of the doors would have to be covered. This would alter the adversative environment that VMI students must now endure. Finding VIII.D.

Physical education requirements would have to be altered, at least for the women. The current program, where every student must pass precisely the same physical test before graduation, would prevent a disproportionate number of women from graduating, thus forcing VMI either to establish different requirements for women, or to eliminate or substantially reduce the requirements so that they could be applied to both sexes, which would remove one important part of the VMI system of education. Finding VIII.E-G.

The introduction of women into VMI would add a new set of stresses on the cadets, of a very different kind than the cadets now face. The belief that this would affect the educational program is well-founded in empirical evidence, and not based on an archaic stereotype. Finding VIII.1; *Williams, supra; Vorcheimer v. School Dist. of Philadelphia*, 532 F.2d 880, 882 (3d Cir.1976), *aff'd by an equally divided court*, 430 U.S. 703, 97 S.Ct. 1671, 51 L.Ed.2d 750 (1977); *see also* Justice Powell's dissenting opinion in *Hogan*, 458 U.S. at 735-46, 102 S.Ct. at 3341-47.

Dr. Riesman testified that the adversative model of education is simply inappropriate for the vast majority of women. He felt that if VMI were to admit women, it would eventually find it necessary to drop the adversative system altogether, and adopt

a system that provides more nurturing and support for the students. Evidence supports this theory, including the West Point experience.[8] Dr. Conrad argued that some women will thrive in the adversative environment, and drastic changes in that aspect of the education will not be necessary. But as Dr. Richardson pointed out, educational systems are not designed for the exception but for the mean. Finding VII.B.1. The changes, which all parties agreed would occur, provide sufficient constitutional justification for continuing the single-sex policy.

The United States has asserted that VMI's decision to continue its single-sex policy in 1986, based on the report of its advisory committee, was not based on "reasoned analysis" or on the evidence before it. It is clear that the Committee met with some advocates of coeducation, and that it rejected their recommendations. However, the committee members also had considerable experience in higher education, as well as intimate knowledge of the VMI program.[9]

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[8] The United States urges that the success at West Point in assimilating women into the institution is proof that VMI could do likewise. Without a doubt, VMI could do likewise, but it is equally without a doubt that VMI's present methods of training and education would have to be changed as West Point's were.

[9] Although *Hogan* requires that a state policy of sex discrimination be based on a "reasoned analysis," it does not suggest how a court should review the analysis. 458 U.S. at 726, 102 S.Ct. at 3337. I understand *Hogan* to require me to consider the constitutionality of VMI's policy *de novo*, according only such weight to the state's analysis as appears appropriate. However, I am not to substitute my judgment for that of the Board of Visitors as if I were the *primary* decisionmaker. *Rostker*, 453 U.S. at 70, 101 S.Ct. at 2654. My conclusions are based on evidence submitted at trial, and are not limited to the 1986 Mission Study Report.

The more thorough self-study undertaken by VMI as part of its accreditation by the Southern Association of Colleges and Schools demonstrates that VMI has applied reasoned analysis to all of its policies, including admissions. The Board of Visitors had available to it a substantial amount of "reasoned analysis" when it considered admissions policy.

I find that both VMI's single-sex status and its distinctive educational method represent legitimate contributions to diversity in the Virginia higher education system, and that excluding women is substantially related to this mission. The single-sex status would be lost, and some aspects of the distinctive method would be altered if it were to admit women. VMI has, therefore, met its burden under *Hogan* of showing a substantial relationship between the single-sex admission policy and achievement of the Commonwealth's objective of educational diversity.

Of What are Women Deprived

Trial testimony established that VMI's military program is absolutely unique. No other school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI. The military and academic courses are available to women at VPI, but without the intensity of the barracks-centered lifestyle that makes VMI so attractive to many applicants, and so important to its graduates. Finding V.17.

It has been established that if VMI were to admit women, it would become more similar to the military barracks at VPI, so its uniqueness would be lost. Even if this were to occur, VMI would remain

the only small college campus in Virginia offering a military program. A woman who wished to live in a military barracks, but preferred a campus of 1,300 students over one of 18,000, would benefit from the availability of VMI.

Considerable speculation, but very little evidence, was presented on the question of whether there would be any demand for a VMI education among women. Because VMI and VMI alumni direct their recruitment efforts only at men, it cannot be precisely determined how much demand there might be among women. Based on the experience at West Point, as well as VMI's experience recruiting black applicants, I conclude that some women, at least, would want to attend the school if they had the opportunity. *Hogan* seems to teach that the court must consider the constitutionality of the policy without regard to the size of the available applicant pool. The Department of Justice filed this suit on behalf of a potential applicant, and that is all that is required to test the constitutionality of VMI's admissions policy.

Absence of Comparable Opportunity for Women

Ironically, although much of the testimony at trial concerned the ways that men and women are different, my ruling is based on a trait that men and women share: Both men and women can benefit from a single-sex education. Indeed, it appears that demand for single-sex education is greater among women, and that the beneficial effects of single-sex education are stronger among women than among men. Finding II.B.3-4.

Gender discrimination, as a rule, works to the benefit of one group and to the detriment of another.

But in a real sense of the word, that is not true in this case because, as the testimony of experts demonstrates, it would be impossible for a female to participate in the "VMI experience." Even if the female could physically and psychologically undergo the rigors of the life of a male cadet, her introduction into the process would change it. Thus, the very experience she sought would no longer be available. Consequently, it seems to me that the criticism which might be directed toward Virginia's higher educational policy is not that it maintains VMI as an all-male institution, but rather that it fails to maintain at least one all-female institution.[10] But this issue is not before the Court.

The relief that the United States seeks in this suit is to require VMI to open its doors to women—not to force Virginia to establish an all-female, state-supported college. *Cf. Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974) (federal court could not exercise jurisdiction over school districts that had not practiced unconstitutional racial segregation in order to achieve racial balance in another school district). This aspect of the case is very similar to *Hogan* in that Hogan did not mount a constitutional challenge because there was no corresponding all-male counterpart to the MUW Nursing School but only sought admission to the MUW pro-

[10] This situation is *not* the result of a longstanding discriminatory policy, but a recent development. In 1839, the same legislative session that founded VMI also incorporated the Farmville Female Seminary Association. The Farmville Female Seminary was made a public institution in 1884. Finding II.2. In addition, Mary Washington, Radford and Madison Colleges were state-supported, all-female colleges until the late 1960's.

gram. The Court was careful to tailor its decision to the relief sought. Thus, whether Virginia can continue to rely upon private colleges to supply single-gender education to females or whether it must operate a state-supported, all-female college is not an issue to be resolved in this lawsuit.

Conclusion

In 1970, a three-judge panel of the Fourth Circuit observed that:

> The trend in this country is away from the operation of separate institutions for the sexes, but there is still a substantial number of private and public institutions, which limit their enrollment to one sex and do so because they feel it offers better educational advantages. While history and tradition alone may not support a discrimination, the Constitution does not require that a classification "keep abreast of the latest" in educational opinion, especially when there remains a respectable opinion to the contrary[.]

Williams, 316 F.Supp. at 137.

Through its Board of Visitors at VMI, Virginia has set an objective of providing single-gender education for males. The evidence in the case, which is virtually uncontradicted, supports Virginia's view that substantial educational benefits flow from a single-gender environment, be it male or female, that cannot be replicated in a coeducational setting. This adds a measure of diversity to Virginia's overall system of education that would be missing if VMI were coeducational. The diversity is further enhanced by VMI's unique method of instruction which was

applauded by all of the educational experts who testified. Thus, Virginia has sustained the requirement that gender discrimination serves an important state educational objective.

Virginia also met the second prong of the *Hogan* test by proving that the objective of diversity of education is met by providing single-gender education. Obviously, the only means of attaining this goal is to exclude women from the all-male institution—VMI. But Virginia did not stop there. It enlarged on the single-gender diversity by maintaining an institution whose method of instruction is unique in all the world.

VMI is a different type of institution. It has set its eye on the goal of citizen-soldier and never veered from the path it has chosen to meet that goal. VMI truly marches to the beat of a different drummer, and I will permit it to continue to do so.

APPENDIX: FINDINGS OF FACT

I. Witnesses
A. Expert Witnesses
B. Fact Witnesses
II. Public Higher Education in Virginia
A. VMI's Contribution to System-Wide Diversity
B. Role of Private Colleges
C. Public Influence on Private Colleges
III. The Unique VMI Educational Method
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I. *Witnesses*

Testimony of the following witnesses, together with stipulations and exhibits supplied the evidence from which these Findings of Fact are made:

A. *Expert Witnesses*

1. Dr. Clifton Conrad testified as the United States' expert witness on education. He is currently Professor of Higher Education and Coordinator of the doctoral program in Higher Education at the University of Wisconsin-Madison, and previously had been on the faculties of the University of Denver, the College of William and Mary, and the University of Arizona. He holds a Bachelor's Degree from the University of Kansas and a Ph.D. in higher education from the University of Michigan. His scholarship has focused on academic programs in higher education. His books and monographs include *The Undergraduate Curriculum* (1978), *Liberal Education in Transition* (1980, with Jean Wyer), and *Curriculum in Transition: Perspectives on the Undergraduate Experience* (1990, with Jennifer Haworth). In 1987-88, he served as president of the Association for the Study of Higher Education. He has testified in several other desegregation cases involving higher education on behalf of the United States. U.S. Ex. 160.

2. Mr. James Francis Brewer, III, testified as the United States' expert witness on physical facilities. He has been Director of Physical Plant at the University of Maryland at College Park since 1985. He holds B.S. and M.B.A. degrees from the University of Maryland. U.S. Ex. 161.

3. Dr. Richard C. Richardson, Jr. testified as one of VMI's experts on educational institutions. He is Professor of Educational Leadership and Policy Studies at Arizona State University. He holds a B.S. degree in education from Castleton State College, as M.A. from Michigan State University, and a Ph.D.

from the University of Texas. After earning his Bachelor's Degree, he served in the Marine Corps for three years, from 1954 to 1957. He taught at a single-sex (women's) college, Vermont College, from 1958 to 1961, and has both professorial and administrative experience at several colleges and community colleges. His publications include *Achieving Quality and Diversity: Universities in a Multicultural Society* (with E.F. Skinner, 1991), and *Fostering Minority Access and Achievement in Higher Education: The Role of Urban Community Colleges and Universities* (with L.W. Bender, 1987). He has previously testified on behalf of the United States in discrimination lawsuits involving higher education. He has served as chair of at least 25 different evaluation teams on behalf of regional higher education accreditation boards, including one team that evaluated West Point. His research in the past 10 years has focused on "the impact of students on colleges and the impact of colleges on students." Tr. 661-66.

4. Dr. David Riesman, a professor of sociology at Harvard University, testified as a VMI expert on education. He holds a bachelor's degree from Harvard College earned in 1931, and a law degree from Harvard Law School earned in 1934. After completing a year of postgraduate study, he served as a law clerk to Justice Brandeis at the United States Supreme Court. He held a teaching post at Buffalo School, and then spent a year as a research fellow at Columbia Law School studying sociology and anthropology. He joined the faculty at the University of Chicago in 1946, and returned to Harvard on the faculty in 1958. His publications include *The Lonely Crowd* (1950), *Constraint and Variety in American Education* (1956), *The Academic Revolution* (with

Christopher Jencks 1968), and *On Higher Education: The Academic Enterprise in an Era of Rising Student Consumerism* (with several collaborators 1980). Because he was unable to travel, he appeared only on videotape produced at a *de bene esse* deposition.

5. Josiah Bunting, III, testified as another VMI expert on educational institutions. Since 1987, he has served as Head Master of The Lawrenceville School, a private preparatory school in New Jersey that changed from all-male to coeducational during his tenure. He graduated from VMI in 1963, and won a Rhodes Scholarship and earned an M.A. at Oxford. He served in the United States Army from 1966 to 1972, serving in the infantry, and as Assistant Professor at West Point. From 1972 to 1973 he was Professor and Acting Head of the U.S. Naval War College. From 1973 to 1977, he served as President of Briarcliff College, then an all-female college. From 1977 to 1987, he was president of Hampden-Sydney College, an all-male private college.

6. Dr. Paul Davis testified as VMI's expert on human physiology. He holds a bachelor's degree from Columbia Union College, and earned a master's degree in physical education from the University of Maryland, and a Ph.D. from the University of Maryland College of Health and Human Performance, Department of Kinesiology, with a major in exercise physiology and a minor in research design and statistics. He has taught physical education to both sexes at the elementary school, junior high school and high school levels, and taught applied physiology at the University of Maryland. He has done extensive consulting for the United States Armed Forces on the

development of physical training programs for both men and women. Tr. 879-84.

B. *Fact Witnesses*

1. General John William Knapp is the Superintendent of VMI. He graduated from VMI in 1954, holds a Ph.D. from Johns Hopkins University, and has been a professor or administrator at VMI since 1959. He was Dean of Faculty from 1984 to 1989, when he was promoted to superintendent. Tr. 28-30.

2. Colonel Norman M. Bissell is the Commandant of Cadets at VMI, a position comparable to Dean of Students at another college. He graduated from VMI in 1961, and received a master's degree from the University of Missouri in 1984. He was on active duty in the United States Army from 1961 to 1987, and returned to VMI in 1990. Tr. 95-96.

3. Lieutenant Colonel Mark Steven Sandy is the director of admissions at VMI. He holds a B.S. from Concord College, and has a master's degree in education administration from Lynchburg College. He assumed his current post in 1988.

4. Colonel Ronald Walker Williams is Professor of Aerospace Studies at VMI. He graduated from VMI in 1964 and earned a master's degree from Golden Gate University in 1985. He has been on active duty with the Air Force for the past 25 years, and has been posted at VMI by the Air Force for a three-year assignment in 1988. He teaches the Air Force ROTC courses at VMI. Tr. 213-14.

5. Colonel William A. Randall is a professor of military science at the University of Virginia, where he is completing a three-year assignment. He holds a B.A. degree from Auburn University and a master's

degree from Duke University. He has been on active duty in the military since 1966. Tr. 243-44.

6. Colonel Rutherford Dean Stickell is Professor of Aerospace Studies and Chairman of the Air Force ROTC program at the University of Virgina. He holds a bachelor's degree from The Citadel, and a master's degree from the University of Southern California, and has been in the military for over 20 years.

7. Joseph M. Spivey, III, is Chairman of the Board of Visitors of VMI. He holds a bachelor's degree from VMI and a law degree from Washington & Lee University. He was admitted to the Virginia bar in 1962, and is a practicing attorney. He was appointed to the VMI Board of Visitors in 1983 and has been chairman since 1987. Tr. 275-76.

8. Dr. Clark King is the head of the Physical Education Department at VMI, and director of the continuing education programs, including both the night and the summer programs. He holds a bachelor's degree from Kearney State College and a doctorate from the University of Virginia. He has been associated with VMI since 1952, and has been chair of physical education since 1963. Tr. 292-94.

9. Major General Stanton R. Musser is Commandant of Cadets at Virginia Polytechnic Institute State University. He holds a bachelor's degree from Gettysburg College, and a master's degree from Central Michigan University. He served in the United States Air Force from 1958 to 1989, and accepted his current position upon retirement. Tr. 441-42.

10. Colonel Patrick Toffler is Director of the Office of Institutional Research (OIR) at the United States Military Academy ("West Point"). He graduated from West Point in 1968, and holds a master's degree from the Naval postgraduate school. The function of the OIR "Is to assess the degree to which [West Point] is successful in realizing its purpose, accomplishing its mission, achieving its outcome goals, and to assist the major decisionmakers in the conduct of their duty." The Office prepares reports on aspects of the West Point programs and Colonel Toffler comes into contact with all of the West Point constituencies. Tr. 478-481.

11. Colonel John Walter Ripley is the commanding officer of the Navy and Marine ROTC programs at VMI. He joined the Marine Corps directly after high school, and then received a fleet appointment to the Naval Academy, from which he graduated in 1962. He also holds a Master's Degree from American University. He has been an active-duty marine for over thirty years, and his service includes teaching appointments at Oregon State University and the Naval Academy prior to his current duty at VMI. Tr. 814-16.[1]

II. *Public Higher Education in Virginia*

1. There are fifteen state-supported four-year colleges in the Commonwealth of Virginia:

Christopher Newport College
Clinch Valley College
College of William and Mary
George Mason University
James Madison University
Longwood College

[1] Testimony was also received from Commander Paul Galanti, a retired Navy Recruiting Officer, General James Morgan Dean of Faculty Emeritus of VMI, and Colonel Paul Maini, Executive Director of the VMI Alumni Association. This testimony did not contribute to the findings of fact.

Mary Washington College
Norfolk State University
Old Dominion University
Radford University
University of Virginia
Virginia Commonwealth University
Virginia Military Institute
Virginia Polytechnic Institute and
State University
Virginia State University

Stipulation 126.

2. Historically, most of Virginia's public colleges were single-sex. Four colleges were originally limited by statute to women only. Mary Washington College, legislatively founded in 1908, became coeducational in 1970. Radford University, founded in 1910, became coeducational in 1972. Longwood College, founded as Farmville Female Seminary Association in 1839 and converted into a public institution in 1884, began a diversification program that led to the admission of men in 1949.[2] James Madison University, founded in 1908, became coeducational in 1966. Stipulation 111; 1839 Va. Acts ch. 167; 1884 Va. Acts ch. 311.

3. On the men's side, the University of Virginia first admitted women only after its single-sex policy was attacked in court. *Kirstein v. Rector and Visitors of the University of Virginia*, 309 F.Supp. 184 (E.D.Va.1970). Virginia Tech was also originally male only.

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[2] The stipulation does not state when Longwood first admitted men. The court in *Kirstein v. Rector and Visitors of University of Virginia*, 309 F.Supp. 184, 186 (E.D.Va.1970), listed Longwood as admitting women only.

4. All public colleges in Virginia, except for the Virginia Military Institute, are now coeducational. Thus, Virginia has one all-male public institution and no all-female colleges.

5. In the Fall of 1989, enrollment at the 15 public institutions included 72,819 men and 85,441 women. Stipulation 113. Of that number, 1312 (all men) are enrolled at VMI. VMI is substantially smaller than all of the colleges in the system except for Clinch Valley College, which has a very different mission.

6. Virginia offers a diverse array of educational opportunities through the decisions of the respective autonomous governing boards of Virginia's colleges and universities, public and private. The State Council of Higher Education's current plan for higher education states that "Virginia has always recognized that there are many kinds of excellence and has supported a diversity of missions among its institutions of higher education." Stipulation 108.

7. The Boards of Visitors of the various public colleges and universities in Virginia have traditionally enjoyed, and now enjoy, broad autonomy in the determination of such issues as the institution's mission, curriculum, the composition of its faculty, and the composition of its student body.

8. The 1990 Report of the Commission on the University of the 21st Century to the Governor and the General Assembly of Virginia notes that the hallmarks of Virginia's educational policy are "diversity and autonomy." Stipulation 105. It further states

> The formal system of higher education in Virginia includes a great array of institutions: state-supported and independent, two-year and senior, research and highly specialized, tradi-

> tionally black and single sex. Opportunities for fundamental change are open to all. But the sea change being felt in Virginia affects the entire system, and we think that Virginia should encourage creativity and discourage complacency by its method of governing higher education and by financial and other rewards.

Stipulation 106.

9. All expert witnesses agree that Virginia's system of higher education is diverse. Tr. 403 (Conrad); Riesman Dep. 89-91; Tr. 984 (Bunting). The diversity is a consequence of the relatively great autonomy given to the individual Boards of Visitors.

10. All Virginia statutes requiring individual institutions to admit only men or women have been repealed. Whether a university should be single-sex or coeducational is in every case decided by the Board of Visitors of the institution.

A. *VMI's Contribution to System-Wide Diversity*

1. VMI contributes to the diversity of Virginia's higher education in two related ways: (1) by providing an opportunity for single-sex education, and (2) through the unique VMI method of character development and leadership training.

2. Institutions of higher education that admit only males contribute greatly to diversity in higher education, and should be preserved. Diversity between different kinds of colleges as well as diverse student bodies at individual colleges is a positive aspect of the American, and the Virginia, higher education system. Riesman Dep. 22, 38-39.

3. Diversity between colleges, and the very high number of colleges, is one of the more striking differences between the American and British higher education systems. Tr. 984 (Bunting).

4. Aside from the unique qualities of the education VMI provides, the Commonwealth of Virginia awards some scholarships, the VMI State Cadetships, exclusively to VMI cadets. During 1990-91, 35 cadets were awarded $147,104. Defendants' response to plaintiff's third set of interrogatories at 16. A substantial number of private scholarships are also available only to VMI cadets. Women have no opportunity to compete for these scholarships.

5. Dr. Conrad concluded that the diversity of Virginia's higher education would not be diminished were VMI to admit women. He acknowledged, however, that single-sex education is a form of diversity. Tr. 371-74, 381-82.

B. *Role of Private Colleges*

1. There are five all-female private colleges in Virginia, Randolph-Macon Women's College, Mary Baldwin College, Sweet Briar College, Hollins College, and Southern Seminary College (which offers only a two-year program). There is one private all-male college in Virginia, Hampden-Sidney College. VMI Exhibit 74A.

2. In the fall of 1989, 3850 women and 2256 men were enrolled in single-sex institutions of higher education in Virginia. All of the women, and 944 of the men, were enrolled in private institutions. Stip. 114.

3. Nationwide, 11,400 men attend single-sex institutions. Of this number, 2,000-3,000 attend The Citadel, a public military college in Charleston, South Carolina; 1,300 attend VMI; and the remainder at-

tend one of nine private institutions. Tr. 675, 724-25 (Richardson). There are about 56 single-sex schools for women, enrolling about 64,000 students. All but one of these are private, the exception being Douglass College in New Brunswick, New Jersey, which shares the campus of the much larger Rutgers University. The Mississippi College for Women remains primarily for women, but is required to admit men to its nursing program. *Hogan;* Tr. 676, 725 (Richardson).

4. From the above statistics, it would appear that the demand for public higher education in Virginia is slightly greater among women than among men. The demand for single sex education is substantially greater among women than among men, both in Virginia and nationwide. The presence of four all-female private schools in Virginia further indicates that the private sector is providing for that form of education to a much greater extent than it provides for all-male education.

5. No defense witness in this case offered to explain why Virginia provides the option of single-sex public education to men but not to women. This appears to be the consequence of individual decisions by each public college in Virginia to admit men. No evidence was submitted concerning the cost or practicality of creating a new, all-female public college, or of converting an existing college into an all-female institution.

C. *Public Influence on Private Colleges*

1. The Virginia Constitution permits the General Assembly to provide loans and other aid to students attending nonpublic institutions of higher education.

Va.Const.Art. VIII, § 8; Stipulation 88. Virginia provides this aid through the Tuition Assistance Grant program. Va.Code § 23-38.11 *et seq.*

2. The report of the General Assembly Commission on Higher Education to the General Assembly of Virginia (Senate Document 19, 1974) states: (a) "Virginia needs the diversity inherent in a dual system of higher education." (b) "Higher education resources should be viewed as a whole—public and private." (c) "Even without state economic aid to private colleges, it is academic and economic waste to permit unwarranted duplication." VMI Ex. 4, at 16.

3. Virginia relies on its independent institutions to offer students choices and meet the educational needs of people in the Commonwealth. Tr. 710 (Richardson). There is substantial voluntary cooperation between the public and private institutions on a variety of programs. VMI Ex. 55.

4. The Boards of Visitors of all of the Virginia public colleges are nominated by the Governor and are subject to confirmation by the State Senate. *See generally* Va.Code § 23. Private colleges face no legal restrictions in how they choose their directors.

5. Aside from the choice of particular college, a significant practical difference for a Virginia resident between attending a public and a private college is that, even with the Tuition Assistance Grant, the private education will be much more expensive.

III. *The Unique VMI Educational Method*

1. The VMI method conforms generally to an adversative, or doubting, model of education. Physical rigor, mental stress, absolute equality of treat-

ment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values are the salient attributes of the VMI educational experience.

2. Some of the defendants initially argued that the VMI experience is available to women in substantially the same form at Virginia Polytechnic Institute State University (VPI). In answer to an early interrogatory, the Commonwealth stated, "There is no unique or special benefit, educational or otherwise, available at VMI which cannot also be obtained elsewhere in Virginia's higher education system." Response of Commonwealth to Second Set of Interrogatories, No. 4. Evidence at trial disproves this contention, which was never asserted by VMI itself. VMI and the military barracks at Virginia Polytechnic Institute are dramatically different institutions that offer dramatically different experiences.

3. The system of education at VMI is not offered elsewhere in the United States. Therefore, women have no opportunity anywhere to gain the benefits of this education. Tr. 139 (Bissell); 373 (Conrad).

4. VMI is sought out by some applicants for admission because it is known to be the most challenging military school in the United States, and because its alumni are exceptionally close to the school. Tr. 206 (Sandy).

A. *The Adversative Model*

1. The VMI experience is predicated on the importance of creating doubt about previous beliefs and experiences in order to create a mindset conducive to the values VMI attempts to impart. VMI Ex. 58 (Richardson Report) at 22-23.

2. The adversative model has been used by military service and in the English public schools. Tr. 686 (Richardson).

3. The adversative model is not in widespread use in American higher education. Dr. Riesman's writings have criticized the permissiveness of American society and the lack of experiencing stress. Dr. Riesman believes that young people rarely experience difficult physical or intellectual demands. Few young people undergo a truly demanding academic program, and even fewer involve themselves in demanding extramural (i.e., outside of the curriculum) programs. While most colleges and universities make it *possible* for a student to get a good education, many such institutions make it easy for students merely to get by. Riesman Dep. 25-30.

4. Colonel N. Michael Bissell, the Commandant of Cadets at VMI, summarized the educational process at VMI as follows:

> I like to think VMI literally dissects the young student that comes in there, kind of pulls him apart, and through the stress, everything that goes on in that environment, would teach him to know everything about himself. He truly knows how far he can go with his anger, he knows how much he can take under stress, he knows how much he can take when he is totally tired, he knows just exactly what he can do when he is physically exhausted, he fully understands himself and his limits and capabilities. Something I think is the mainstay of leadership. I think every VMI man that leaves there knows a great deal about his human capacity to do things under all kinds of duress and stress.

Tr. 803-04; *see also* Tr. 820-22 (Ripley).

5. All experts agreed that the individual systems comprising the VMI method for leadership and character development must be understood holistically. The individual systems are integrated into a unified experience through the barracks life. Altering any system will affect the educational experience as a whole. Tr. 690, 707, 758 (Richardson), 993 (Bunting), 780-81 (Bissell), 409 (Conrad).

B. *Rat line*

1. Entering students at VMI are called "rats" because the rat is "probably the lowest animal on earth." In general, the rats are treated miserably for the first seven months of college. Tr. 102 (Bissell).

2. Behavior that contributes to VMI objectives is rewarded; behavior that detracts is swiftly punished. Both punishment and reward are collective as well as individual. Being punished or rewarded for the sins or accomplishments of brother rats, as well as for one's own, builds a sense of class solidarity in addition to individual responsibility. The rat line is sufficiently rigorous and stressful that those who complete it feel both a sense of accomplishment and a bonding to their fellow sufferers and former tormentors. VMI Ex. 58 (Richardson Report) at 4; Tr. 347-48 (Conrad).

3. The rat line is an extreme form of the adversative model. It challenges all values and all forms of behavior in order to instill the values and behaviors for which VMI exists. Tr. 684-85 (Richardson).

4. Features of the rat line include indoctrination, egalitarian treatment, rituals (such as walking the rat line), minute regulation of individual behavior,

frequent punishments, and use of privileges to support desired behaviors. Tr. 685 (Richardson).

5. The rat line is more dramatic and more stressful than Army boot camp or Army basic training. Tr. 785-86 (Bissell). It is comparable to Marine Corps boot camp in terms of both the physical rigor and mental stress of the experience. Tr. 818 (Ripley), 684 (Richardson).

6. At VMI almost every conceivable kind of behavior is anticipated and prescribed. There are thousands of regulations in place that govern cadet life. Tr. 395 (Conrad).

7. "Motivational activities" including stoop runs, fifteen-minute running and calisthenic events, rifle runs, training marches, and the like, are critical aspects of the rat line. Tr. 348-49 (Conrad).

8. The rat line is a very intense experience. Part of that experience is a tough physical training program that begins during the first 8-10 days that cadets spend on the VMI campus. The rigorous physical training is an important component of the rat system. Tr. 933 (Conrad).

9. Cadets who participate in NCAA sports during the regular school year are excused from the physical parts of rat training during the hours that they are practicing their sport. Tr. 112 (Bissell). Aside from that exception, all rats participate in all aspects of rat training.

10. All VMI cadets experience the rat line. The only time cadets can join the corps at VMI is in August, at the beginning of the school year. If cadets leave after joining, they are not replaced. Tr. 92-93 (Knapp).

C. *Class System*

1. The class system at VMI is a system of privileges and responsibilities aimed at developing the character and leadership of cadets. Each class has specific responsibilities. The first class, or seniors, are responsible for providing overall leadership, writing the standard operating procedures for the rat line for the following year, supervising the rat breakout, and for being a dyke to a rat. The third class, to cite another example, serves as disciplinarians to the rats. The class system is a very highly-developed system for cultivating leadership. Tr. 346-48 (Conrad).

2. After the rat line strips away cadets' old values and behaviors, the class system teaches and reinforces through peer pressure the values and behaviors that VMI exists to promote. This occurs within the barracks setting. The class system supplies the constant supervision of cadets, tutoring, and dispensation of privileges to reward desired values and behaviors. Tr. 687 (Richardson).

3. The degree and harshness of the regulations imposed through the class system is possible only through a peer system. Professionals working in the same environment could not duplicate the level of stresses without adverse consequences. Tr. 687-88 (Richardson).

D. *Dyke System*

1. The dyke system is closely linked to the class system, and is the arrangement by which each rat is assigned a first classman as a mentor, called a "dyke." The dyke system provides some relief

from the extreme stress of the rat line. Tr. 685 (Richardson).

2. The VMI system of education creates a sense of loyalty to one's brother rats. The dyke system contributes to this sense of loyalty. The dyke system also creates a cross-class bonding and provides a model for leadership and support. Riesman Dep. 43; Tr. 141-42 (Bissell).

E. *Honor Code*

1. The VMI honor code holds that a cadet "does not lie, cheat, steal nor tolerate those who do." The sole penalty for violations of the VMI honor code is expulsion. The VMI honor code dominates all facets of institutional life. It is stringently enforced by an honor court comprised of cadets elected from the upper two classes. VMI Ex. 58 (Richardson Report) at 6.

F. *Barracks*

1. Unlike most colleges, where the library is central and the dormitories are peripheral, the most important aspects of the VMI educational experience occur in the barracks. The barracks, therefore, are crucial to the VMI experience. Tr. 683-84 (Richardson). All cadets are required to live in the barracks for all four years at VMI. Tr. 761 (Richardson); VMI Ex. 11 at 11.

2. The barracks are the situs of the inspections, the rat-dyke relationship, administration of the class system, administration of the honor system, and much of the new cadet training, or rat line.

3. The barracks are designed to reduce all cadets to the lowest common denominator, from which the

new cadet training system, class system, honor code, military system and academic system year-by-year builds the values, attitudes and behaviors expected from VMI graduates. In the process, upperclassmen exhibit unusual concern and serve as mentors for lower classmen. Producing a VMI graduate without the barracks experience would be equivalent to dressing someone up in the uniform of a Marine without first sending them to boot camp. VMI Ex. 58 (Richardson Report) at 3.

4. The report of the Reaffirmation Committee of the Commission on Colleges for the Southern Association of Colleges and Schools on March 16-19, 1986, observed that "[t]he barracks, VMI's student housing, is the center of campus life and reflects many of the educational objectives of the institution. There is no professional staff living in the barracks but cadets themselves provide support for life there." VMI Ex. 35, at 49.

5. The barracks' configuration is a training aid, and the barracks is a total training environment in which the class system functions. Each class is assigned a floor in the barracks, which has four floors. There is a total lack of privacy. Everyone knows what everyone else is doing. The closest a cadet can come to privacy at VMI is a study table in the library because there is literally no place in the barracks that physically affords privacy. The open windows on the doors in the barracks are significant because they enable the officer in charge to walk around and check in each room at night and see every cadet without anything being hidden. This spartan living and humbleness is an aspect of the egalitarian ethic at VMI. Tr. 794-98 (Bissell).

6. The average occupancy rate of cadet rooms at VMI, according to VMI's 1985 Self-Study, was 3.7 cadets per room. It is uncommon, if not unique, for a college or university to have a dormitory occupancy rate exceeding three persons per room. Tr. 435-36 (Brewer).

7. The barracks are stark and unattractive. The windows and the doors ensure that cadets are never free from scrutiny. There is constant intermingling of cadets as a result of the close and intimate quarters and the number of cadets assigned to a room. Ventilation is poor. Furniture is unappealing. A principal object of these conditions is to induce stress. Tr. 683 (Richardson), 350 (Conrad).

8. There are no locks on the doors of cadet rooms in barracks, no windows in the barracks doors, no window shades or curtains. Barracks rooms open onto stoops. The stoops are open corridors at each level and provide access to the gang bathrooms. On the fourth floor a cadet cannot go to the bathroom or go to take a shower without being observed by everyone in that quadrangle on all levels. This places cadets under constant scrutiny and permits minute regulation of behavior, especially for the fourth classmen who reside on the top floor. VMI Ex. 58 (Richardson Report) at 3; Tr. 683-84 (Richardson).

9. The egalitarian treatment associated with barracks life is as important as the elements of stress and lack of privacy. In barracks, a cadet is totally removed from his social background. Tr. 992-93 (Bunting).

10. No other institution, including the service academies, places such emphasis on barracks or dormitory life. The lifestyle system at VMI is unique. Tr. 394 (Conrad).

G. *Military System*

1. The military regulations, etiquette, and drill, primarily furnish a rationale for the rigorous activities that are features of the other VMI systems, including the comprehensive regulation of behavior and the wearing of uniforms. The military regulations confine the choices and developmental tasks confronted by students to those considered essential to the achievement of VMI's mission. They are not directly connected to the ROTC program. VMI Ex. 58 (Richardson Report) at 6; Tr. 690 (Richardson).

2. Each cadet who matriculates at VMI must select one of the four ROTC programs during the first week of school. All cadets must be affiliated with one of the four ROTC programs, for all four years at VMI. Tr. 216-18 (Williams); Stip. 33.

3. Nothing about the Air Force ROTC program at VMI, as described in the VMI promotional booklet, is unique to VMI (other than the absence of women). Tr. 234 (Williams); U.S. Ex. 95.

4. The ROTC programs at VMI operate independently of the barracks system and its various components such as the rat line, the class system and the dyke system. Tr. 819-20 (Ripley).

H. *Educational System*

1. The academic program (aside from physical education) at VMI is not unique. VMI offers undergraduate courses leading to Bachelor of Arts and Bachelor of Science degrees, in liberal arts, science, and engineering disciplines. VMI Ex. 11.

2. All of the programs offered at VMI, and virtually all of the courses, are available to women at

VPI. Because VMI is a much smaller school, it offers many fewer courses. VMI Ex. 8, 11.

3. The academic standards for admission to VMI are somewhat lower than those for VPI. VMI incoming students have slightly lower median SAT scores and slightly lower median class rank. VMI Ex. 62M.

I. *Evening and Summer Sessions*

1. The VMI summer session is not conducted as a military college. Stip. 62. During the summer session the VMI Corps of Cadets does not exist or function as an organized body. In the VMI summer session, the class system, the rat system, and the dyke system are not in operation. Stips. 62-64.

2. During the summer session, summer students are not subject to military discipline and training, and are not required to wear uniforms or participate in military formations or drills. Stip. 65.

3. During the summer session, no enrolled student, whether or not a VMI cadet, is required to live in the barracks, but has the option to reside in the barracks or in housing in the surrounding area. During the academic year, all enrolled students are required to live in the barracks. Stip. 67.

4. During the summer session, females, both students and non-students, may not live or visit in the barracks. Stip. 68.

5. During the summer session, there is no physical training and no leadership training. Stip. 71.

6. All students enrolled in the summer session are required to abide by the honor code; however, the Student Honor Court, which adjudicates honor cases during the regular session, is not in operation. Stip. 72.

7. During summer session, outsiders (i.e., non-VMI people), live in barracks. For example, participants in sports camps and in the College Orientation Workshop program for black male high school students live in the barracks. Tr. 308 (King), 794 (Bissell), Stip. 69.

8. VMI summer session differs in many ways from the VMI regular session. It has a different purpose, offers different programs, is administered separately, has different admissions criteria and does not offer a VMI degree or military training. *Id.* No. 13, Tr. 792-94 (Bissell).

9. VMI maintains a very small evening college program. Cadets are not permitted to attend the evening school, nor do evening school students participate in any cadet activities. The evening school has no military component, and cadets and evening school students interact in no respect. No evening school students live in the barracks. Tr. 294 (King); 791-92 (Bissell).

IV. *VMI's Mission*

1. The mission of VMI is concisely and authoritatively captured in the final report of the Mission Study Committee of the VMI Board of Visitors (issued May 16, 1986), which states:

> It is the mission of the Virginia Military Institute to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril.

> To accomplish this result, the Virginia Military Institute shall provide to qualified young men undergraduate education of highest quality—embracing engineering, science, and the arts—conducted in, and facilitated by, the unique VMI system of military discipline.

VMI Ex. 40.

2. VMI's mission is to produce educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary. Tr. 680-81 (Richardson), 41 (Knapp).

3. The concept of citizen-soldier has been associated with VMI for nearly a century and a half. VMI's mission is to train disciplined leaders for civilian and/or military life. Tr. 341 (Conrad).

4. Dr. Conrad discerned five basic goals that VMI seeks to promote in fulfilling its mission of preparing leaders: (1) education, both general and specialized; (2) military training; (3) mental and physical discipline; (4) character development; and (5) leadership training. Tr. 343-44.

5. Dr. Conrad testified:

> [VMI] is an institution with a very, very powerful ethos. What is that ethos? It's a commitment to the citizen-soldier, a commitment in which the values of how one goes about preparing a citizen-soldier have taken shape, been nourished over time and I reflected it in the development of . . . eight, at once independent and at the same time, highly interdependent systems. This is an institution that has a very powerful ethos, a compelling institutional culture in which it is in essence a kind of total cul-

> ture. . . . People who know higher education know VMI, and now I certainly, in a much deeper sense understand the powerfulness of that ethos, [which] engenders such great strength and loyalty. . . . Here was a distinctive culture, with a rich ethos, and in many ways a quite extraordinary tradition of service to the state and nation.

Tr. 354-55.

6. It is important for a college to be able to articulate its mission, for more than public relations purposes. An institution must know and be able to tell others what it stands for and why it exists. Riesman Dep. 32-34; Tr. 388 (Conrad).

7. VMI has done a very good job of conveying its goals and its values, and has been successful in accomplishing those goals; specifically, instilling physical and mental discipline, character, and a kind of moral code. Tr. 389 (Conrad).

A. *Character Development*

1. Dr. Richard C. Richardson, Jr., an expert in higher education, single gender schools and leadership, testified that VMI is extremely unusual, even unique, in that it makes the development of character its primary purpose. VMI is primarily involved in moral development and leadership preparation. Tr. 691, 695, 765.

2. Dr. David Riesman, a leading sociologist and authority on higher education, has, in his writings, expressed dismay over the increasingly egotistical, narcissistic people coming out of our institutions of higher education. Dr. Riesman believes that the personal value of self-discipline is an important concept

for colleges and universities to teach because the popular culture supports hedonism and early gratification. As a result, young people do not develop as they should. Riesman Dep. 25.

3. As a consequence of completing the rigorous tasks, succeeding, and actually graduating from VMI, VMI cadets have a sense of having overcome almost impossible physical and psychological odds. They have been put through great physical pressures and hazards, and just to have made it yields a feeling of tremendous accomplishment. Riesman Dep. 49-50.

4. VMI alumni overwhelmingly perceive that their VMI educational experience contributed to their obtaining personal goals of leadership, responsibility, self-confidence, ability to get along with others, becoming a more complete person, independence, self-reliance, adaptability, and developing a strong sense of honor and integrity. VMI Ex. 62H-62I.

5. Cadets attend VMI for these reasons: (1) because of the rigor of the experience, which represents a challenge and which he believes will test him to the ultimate; (2) because he is not satisfied with his work habits or self-discipline, and wants to become a different person; and/or (3) because he knows someone who recommends it, or because his father attended VMI. Tr. 681 (Richardson).

6. Once they arrive at VMI, cadets appreciate various attributes of the Institute: (1) the openness and the fact that they hear very directly and very candidly about their shortcomings as well as the things they do well; (2) the intensity of the experience, and the extent that it challenges them to be better; (3) the relationships they develop; and (4) the absence of distinctions between cadets, and the egalitarian environment. Tr. 681-82 (Richardson).

7. VMI's emphasis on character formation has been consistent since its founding. VMI was founded on the site of an arsenal in Lexington, Virginia, by act of the Legislature in 1839. It was patterned on the United States Military Academy at West Point and the Ecole Polytechnique, an engineering school in Paris founded during the French Revolution. VMI Ex. 54, p. 7; 68; 61; 77A; 77M; Stips. 11-13.

8. Within a few years of the founding of VMI, most of the systems of character-building and leadership training that characterize VMI today were in place, with the exception of the dyke system, which the Corps evolved later as a corrective to a rat line that had become overly harsh. VMI Ex. 61 at 397-98; 68.

9. Throughout VMI's history, its military system —the use of military regulations, etiquette and drill —has served the function of teaching self-discipline. It is intrinsic to the VMI theory of education, but it is a means to an end, not an end in itself. The role of VMI is not primarily to develop career military men for the U.S. armed services. Stips. 26, 45, 131, 135, 138, 141; Tr. 342 (Conrad), 775 (Richardson); VMI Ex. 77A, 77D, 77F, 77N, 77O, 77S, 77T.

B. *Civilian Leadership*

1. VMI takes students that are average from an academic perspective, and through the character development program, graduates people who have more than average commitment and motivation as well as character. Tr. 695 (Richardson).

C. *Military Leadership*

1. Since 1842, at least 13,954 VMI alumni have served in the armed forces during wartime. Of these,

at least 10,233 were commissioned officers and 128 were flag officers. VMI Ex. 76.

2. Military training is one of the basic goais that VMI seeks to promote in fulfilling its mission of preparing leaders. Tr. 343-44 (Conrad).

3. The VMI experience promotes the development of qualities important to effective combat leadership: Self control, self discipline, and the belief that you must subordinate your own personal desires and well-being to the good of the whole unit. The aspects of the VMI experience that are most significant in developing these qualities are: (1) the rat line; (2) the dyke system; and (3) the class system. Tr. 820-22 (Ripley).

4. The outcome of the VMI educational system is graduates who are prepared to be citizen-soldiers. Because of the VMI experience, VMI alumni are prepared to find the military benign in comparison with much of what they experienced at VMI. They are prepared for difficulty, and are prepared to help others in difficulty. Riesman Dep. 45-46.

D. *VMI Mission Study*

1. The General Assembly of Virginia has delegated to the VMI Board of Visitors the making of VMI's admission policy pursuant to Va.Code Annot. 23-104, with reservation to the General Assembly pursuant to Va.Code § 23-92.

2. The VMI Board has seventeen members, including the Adjutant General of Virginia who serves *ex officio*. At least four members of the Board cannot be VMI alumni. Va.Code § 23-93. The members are persons of achievement and learning from varied backgrounds, occupations and professions. Tr. 944-47, 966-67 (Spivey).

3. The VMI Board of Visitors established the Mission Study Committee in October 1983. The Committee was established to coincide with a self-study then being conducted by the Institute. The Committee was also charged with examining the legality and wisdom of VMI's single-sex policy in light of *Mississippi University for Women v. Hogan*. It was charged with researching the effect of integration of women into the VMI Corps of Cadets. The Board of Visitors directed the Committee to examine the Institute's mission, and the relationship between its admission policy and achievement of that mission. Tr. 948-49 (Spivey).

4. The Mission Study Committee was comprised of seven persons, three of whom who were VMI alumni. The Committee included a female, Dr. Virginia Lester, then President of Mary Baldwin College. Tr. 949-50 (Spivey).

5. In preparation for their deliberations, the Mission Study Committee read materials on education and on women in the military. They made site visits to single-sex and newly coeducational institutions.

6. On the visit to West Point, the Committee met with the Special Assistant to the Superintendent for Policy and Planning, the Director of Admissions, representatives of the Commandant, Director of the Center for Leadership, the Special Assistant to the Commandant for Honor, the Dean, the West Point historian and other selected officers and cadets, as well as with the Superintendent. The discussion focused on the issue of the integration of women at West Point.

7. West Point provided generally favorable information concerning coeducation: (1) male and female cadet attrition occurs for the same reasons; (2)

resentment of female cadets by male cadets has faded and "[a]cceptance is gained on the basis of individual achievement"; (3) VMI graduates will "probably be considered disadvantaged in the coed Army" because they do not come from a coed environment; (4) the introduction of women did not significantly change West Point; (5) women perform and compete as well as men in cadet basic training, cadet field training, and cadet advanced training, which are summer training programs; (6) training for men and women is comparable, but not identical, taking into account gender-based differences; (7) female cadets take the same physical education courses as men, except that they take self defense instead of boxing and wrestling; (8) the cost of educating a cadet did not rise significantly with the admission of women; (9) there had been "no changes in the curriculum, procedures, or facilities of the academic program because of the admission of women"; (10) female cadets have had no trouble with the West Point honor system. "Women are underrepresented in honor offenses," and "[t]he system is applied equally to men and women"; and (11) gender integration has been successful, and "women's accomplishments have excelled all anticipated levels." U.S. Ex. 68.

8. In its visit to the Naval Academy, the Committee met with the Superintendent, the Dean of Admissions, the Academic Dean, the Acting Commandant, the Professional Development Officer and other selected officers and midshipmen of both sexes. Once again, the Committee explored a whole range of issues regarding the integration of women into the Corps—issues such as gender discrimination, discipline, academic performance, fraternization, inte-

gration into the plebe system and honor system, recruiting requirements and modifications of the physical regimen. The committee was told that: (1) "[t]here have been no changes in the Naval Academy academic program because of the introduction of women"; (2) the plebe indoctrination system of the first year "imparts stress and pressure for the entire first year," and "[w]omen are totally integrated into the entering class except for the obstacle course and some of the physical aptitude exercises"; (3) "[t]he success rate of midshipmen at the Naval Academy depends on a combination of academic rating, conduct rating, and performance rating," and "[m]ale and female midshipmen do equally well;" (4) although the Naval Academy modified its physical aptitude entrance requirements for women, male physical standards were not changed; (5) women are a minority at the Naval Academy, and some deal with this effectively and some have a hard time; and (6) "[t]he relationship between male and female midshipmen becomes more harmonious each year. Total acceptance has taken a long time; some midshipmen are more ready to accept women than others." *Id.* The Acting Commandant stated that "[n]othing has changed at the Academy except some physical training requirements and some facilities. Women have performed very well at the The Naval Academy and women have met same academic standards as men." *Id.* p. 6.

9. The Committee also visited Washington & Lee University for an interview with Dr. John D. Wilson, president of that institution. There, the Committee learned that: (1) the decision to admit women to that institution was "based on the need to maintain and improve academic quality. . . ."; (2) "the honor

system based on a 'closed society of shared values' would not be threatened. . . ."; and that (3) due to its changed admissions policy, better qualified students are expected to be attracted to the institution and that as a result the quality of life there will improve. U.S. Ex. 92C. Significantly, Dr. Wilson made the following observation:

> A severe life of military discipline is at the core of the VMI experience. There is pride in mutual suffering which binds the classes together. If women were admitted, the system would have to be modified. The entire system would not be destroyed, but modifications would be inescapable.

Id.

10. Mr. Casteen participated in the introduction of coeducation at the University of Virginia, and visited the federal service academies to obtain information on how those institutions were preparing to integrate women. He characterized the introduction of coeducation at the University of Virginia as a "very positive experience." U.S. Ex. 69. He stated that, contrary to expectations, female students at the University of Virginia tend to enroll in the strongest departments and superior programs including engineering and architecture. *Id.* He pointed out that "all male colleges which have admitted women have been strengthen[ed] by women. . . ." *Id.* at 2. He emphasized the role of an institution's leadership in the admission of women: "[I]t happened [at the University of Virginia] because top leadership made it happen." *Id.* at 3. Most tellingly, he stated:

> [T]he success rates of women at the USMA have been extraordinary. He stated that it was his observation that women will conform and

excel in any environment. He added that their success will depend on the application of the internal discipline system and whether or not it is applied equally to all cadets. He pointed out that at UVA, women were not assigned to separate dormitories but housed in coed dorms.

* * * * *

VMI represents the idea that every citizen is a soldier on demand, and this should include women. . . . Thus, he stated, the Institute has a chance to provide leadership in this regard by training women for military service.

Id. at 2, 3.

11. The Mission Study Committee issued its final report in May 1986. It "found no information that would warrant the change of VMI status as a single-sex college." The Report provided very little indication of how this conclusion was reached. VMI Ex. 40. The one and one-half pages in the committee's final report devoted to analyzing the information it obtained primarily focuses on anticipated difficulties in attracting females to VMI. *Id.* p. 2-3. One paragraph of this analysis epitomizes the current position of the VMI defendants in this litigation:

> The presence of women at the Institute would not alter the program academically; however, there would have to be some adjustments made in the military and physical demands made upon male cadets. Because many of these demands contribute to the ethos of which the Virginia Military Institute is proud and which, it is firmly believed, contributes to the unity of the Corps, there is doubt that the same spirit could

> be maintained at the same level in the same way if women were introduced into the Corps.

Id. p. 2.

12. The Report of the Reaffirmation Committee of the Commission on Colleges for the Southern Association of Colleges and Schools on Virginia Military Institute (March 16-19, 1986) provides:

> The visiting committee found that although the statement of purpose had not been changed since the last self-study, the Board of Visitors assisted by staff of the Institute is reviewing VMI's mission. This review has been thorough and has included visits to other institutions with review of their mission and purpose statements. The committee commends the Board and VMI administration for recognizing the need for periodic review of the Institute's purpose and for engaging in activities necessary to modify that statement of that purpose as may be indicated.
>
> As the self-study states, the Institute's Mission Statement has served it well over the years. As an institution approaching its 150th birthday, the Mission Statement reflects the constant purpose of VMI to provide a distinctive and superior academic program conducted in and facilitated by a rigorous system of military discipline. Graduates of the Institute come to know this mission in a very personal way by their participation in VMI's unique system. The graduates as products of their system have by their achievements brought distinction to the Institute. . . .

VMI Ex. 35 at 5, 12.

13. The Mission Study Committee of the Board of Visitors of the Virginia Military Institute found that

the admission of women into the VMI Corps of Cadets would alter the mission of VMI. It considered the reasons that other institutions had changed from single-sex to coeducational status. It found the motivation to be mixed and further found that none of the motivating factors of the other institutions applied to the VMI mission. VMI Ex. 40 at 2.

14. This evidence amply supports a finding that VMI's mission was established early in the life of the institution, and has been continued only after reasoned and careful analysis by the Board of Visitors.

V. *Mission of Military Unit at VPI*

1. The purpose of the VPI Corps of Cadets "is to produce men and women of the Virginia Polytechnic Institute and State University who are honorable, educated and trained for military service to their country and prepared to be effective leaders in the varied work of military and civil life." Stip. 152; Tr. 460 (Musser); U.S. Ex. 57.

2. VPI has approximately 18,000 students, roughly 40% of whom are women. Its Corps of Cadets, a residential ROTC unit, now contains 394 cadets, including 67 women. Tr. 443 (Musser).

3. All unmarried VPI students enrolled in the ROTC program must live in the residential hall. Married cadets are not required to live in the hall. Tr. 472 (Musser).

4. Females first entered the VPI Corps of Cadets in the fall of 1973 and were assigned to a separate unit within the Corps. In February 1979, "the female cadets were integrated into the eight regular line units. . . . Concurrent with the integration of the female cadets, a female version of the male uniform was authorized, thereby bringing about a

greater uniformity in the attire of Corps members." U.S. Ex. 60.

5. There are no differences on the basis of gender in admission requirements to the Corps, in participation in the Corps, or in physical accommodations for cadets. Tr. 469-70 (Musser). Female cadets at VPI have, at one time or another, held every leadership position in the Corps, including regimental commander, which is the most senior position. Stip. 156; Tr. 447-48.

6. The typical weekly schedule for members of the Corps is the same for men and for women. Tr. 450; U.S. Ex. 51, Reg. 3.1. Each morning one battalion, consisting of 250 cadets, forms up and marches to breakfast. After breakfast, cadets start their academic day which normally runs until 4:00 or 5:00 p.m. At 5:00 p.m., there is a retreat ceremony, and cadets are required to be in their rooms at 7:00 p.m., with lights out at 11:00 p.m. Tr. 448-49. Cadets must be in uniform all day. Tr. 450 (Musser).

7. Each new cadet goes through new cadet training, also called "cadre week," which takes place about eight days prior to the entry of all other freshman into Virginia Tech. Tr. 450-51; U.S. Ex. 77. Cadre week is a "tough week of learning," which involves classes, marching and drill lessons, lectures on the honor code, and athletics. It starts early each morning and ends about 11:00 p.m. Tr. 451. Without any distinctions, men and women participate in the same activities during cadre week. Tr. 452 (Musser).

8. The new cadet system, which is mandatory for all entering cadets, runs until sometime between Thanksgiving and Christmas, when the new cadets are recognized as a class by the upperclassmen. The

new cadet system includes daily calisthenics, exercises, runs, and other athletics. Women are required to participate in the same calisthenics, exercises, and runs as the men, although some allowances are made for gender differences, particularly with regard to upper body strength. Both men and women participate in all parades and drills. Tr. 454-56 (Musser). In sum:

> All VPI Cadets must successfully master in their first year a basic training program. The basic training program is a rigorous challenge, physically and mentally. It is intended to place all cadets on equal footing; teach fundamentals of military courtesy and discipline; impress upon cadets military customs, ideals, and esprit of the Corps and instill respect for authority, self-reliance, and develop leadership potential. VPI believes that completion of the training program also serves as a binding element between and among cadets.

Stip. 155.

9. The new cadet system requires memorizing "new cadet knowledge," which is information about the Corps that cadets must be able to recite to upperclassmen on demand. If a cadet does not know certain information when he or she is asked, that cadet can be required to do push-ups or, in some cases, marching tours. A tour is a one-hour march around the barracks with five-minute breaks every twenty minutes. Both men and women can be subjected to push-ups or tours. Tr. 457-59 (Musser); U.S. Ex. 16.

10. The Corps' honor code states: "I will not lie, cheat or steal nor tolerate those who do." Tr. 461-62; U.S. Ex. 57. The Corps' disciplinary system is modeled after the Uniform Code of Military Justice, and it applies equally to men and women. Tr. 462.

11. The VPI Corps is organized along Army lines, but a system of class privileges also exists. These entitle upperclassmen to greater freedoms as they progress. Tr. 463-64 (Musser); U.S. Ex. 57.

12. Both male and female cadets are subject to scheduled and unscheduled room inspections. Failure to pass inspection results in demerits. No distinctions are made on the basis of gender. There are no restrictions regarding who can visit the cadet dormitories, but visitors must be escorted. Tr. 466-68 (Musser); U.S. Ex. 57.

13. The Corps has a dyke system similar to VMI's, the primary difference being that VPI uses juniors and VMI uses seniors. Both males and females participate in this mentor system. Tr. 468-69 (Musser).

14. Two floors in each building house other students who are not cadets. These students share the same facilities throughout the buildings with the cadets. Tr. 465-66 (Musser).

15. In a section of one of the residence halls, where the regimental cadet staff is housed, the men and women share the same bathroom, although not at the same time. There currently are four men and two women on the regimental staff. Tr. 427, 473 (Musser).

16. VPI cadets eat in the same mess hall as other students, although there is no section set aside for the Corps. Other students can also eat in that section. By contrast, cadets at VMI eat together in one large

facility that accommodates all of them. VPI cadets normally eat both breakfast and dinner together. Tr. 428, 457 (Musser.)

17. The institutional environment of the VPI Cadet Corps differs greatly from that of VMI. Because only 2-3% of VPI students live in the Cadet Corps barracks, the military experience is more diffuse. Tr. 336 (Conrad).

18. Because VMI is a small place with 1,300 students, and VPI is a "multiversity" with 18,000 students in graduate as well as undergraduate courses, it offers its students a different educational experience. Tr. 359 (Conrad).

19. The most dramatic differences between VMI and VPI concern the operation of the respective Corps. VMI emphasizes uniformity, hierarchy, and the adversative method. VPI recognizes individual differences and is more informal. Tr. 361 (Conrad). VPI uses "positive motivation" rather than the "negative motivation" used at VMI. Tr. 474 (Musser).

20. The differences between VPI and VMI's educational experiences outweigh the similarities, independent of gender. Tr. 363-64 (Conrad). Thus, the programs have similar goals but very different methods. This leads to two conclusions: (1) Women are denied a unique educational opportunity that is available only at VMI; and (2) The success of women at VPI sheds little light on whether women would be successful at VMI.

VI. *Contrasting Mission of Federal Service Academies*

1. The mission of the federal service academies is to prepare cadets for career service in the armed

forces. This is very different from the mission of VMI, which is directed at preparation for both military and civilian life. Only about 15% of VMI cadets enter career military service. Tr. 410-11 (Conrad); Riesman Dep. 98-99.

2. VMI has gone to considerable lengths to assure the public that it is not simply a military college. Tr. 342-43 (Conrad).

VII. *Differences Between Men and Women*

A *Gender-Based Physiological Differences*

1. When Congress made the decision to admit women at West Point, they instructed the Military Academy, in effect, to change whatever standards needed to be changed in order to accommodate physiological differences between men and women. West Point has identified more than 120 physiological differences that exist between men and women, and tries to accommodate those differences to the minimal extent necessary. Tr. 510-11, 513 (Toffler).

2. The physiological differences between males and females identified by West Point's Office of Institutional Research are very real differences, *not stereotypes*. Tr. 519 (Toffler).

3. Most men perform far better than most women in activities which require explosive power, e.g., sprinting, basketball throw, medicine ball put, and jumping events. Even when size is held constant, females are, on the average, only 80% as strong as males. VMI Ex. 119 at 26.

4. The speed of movement in women is, on the average, slower than in men. VMI Ex. 119 at 27.

5. Aerobic capacity relates to the ability to consume and utilize oxygen. The number of liters of

oxygen one can effectively metabolize on a minute-by-minute basis indicates the fitness level of a person. Using the applicant pool of individuals for induction into the U.S. Army, Dr. Paul Davis, VMI's expert in human physiology, determined that for high fitness level requirements, such as those for military firefighters, infantrymen, and most of the combat arms, 5% or fewer median college-age females would possess the requisite fitness level to perform those jobs, as compared to 85% of median college-age males. Approximately 15% of median college-age females can perform activities requiring medium aerobic capacities. Approximately 95% of median college-age males can perform activities requiring medium aerobic capacity. VMI Ex. 59A; Tr. 886-88.

6. High maximal lifting capacity refers to the ability to lift 50 kilograms to a height of 132 centimeters of distance, which corresponds to the tail board of a military truck. Approximately 7% of median college-age females possess high maximal lifting capacity, as compared with approximately 80% of males. Approximately 50% of median college-age females can engage in activities requiring a medium maximal lifting capacity, while 100% of median college-age males can engage in such activities. VMI Ex. 59B; Tr. 888-90 (Davis).

7. On the average, college-age females possess approximately 10% more body fat than college-age males. Body fat imposes a burden on some kinds of physical performance. VMI Ex. 59C; Tr. 89-92 (Davis).

8. On the average, college-age females perform a two-mile run approximately three minutes slower than the median for college-age males. VMI Ex. 59D; Tr. 893-95 (Davis).

9. The median college-age female is not capable of performing push-ups equivalent to that of the median college-age male. Of the females tested, none was able to come close to meeting the push-up requirement of the VMI physical fitness test. The maximum number of push-ups by a female was 18, compared with a minimum requirement of 45 push-ups on the VMI fitness test. VMI Ex. 59E; Tr. 894-95 (Davis).

10. There is no data available to compare the performance of males and females with respect to pull-ups because only the Marine Corps has a requirement for pull-ups. Dr. Davis testified that the female is at a distinct disadvantage as far as the performance of that activity, and the difference between performance of the genders in this activity is 500-1000 percent. The minimum requirement for pull-ups for the VMI physical test is five. Tr. 896.

11. Dr. Davis examined aggregate data related to injuries incurred among a group of 2,400 persons participating in Army basic training. Army basic training has a duration of eight weeks, while the VMI rat line has a duration of about seven months. The data shows that physical fitness and avoidance of injury are correlated; as one's fitness level improves, the incidence of injury goes down. However, regardless of fitness level, differences exist between males and females across the board in that females suffer injuries more frequently than males. Tr. 907-13.

12. Median college-age females tend to sustain injury up to eight times the rate of median college-age males when engaged in the same or similar physical activities. VMI Ex. 59G to 59O; Tr. 909-13 (Davis).

13. By the most conservative estimate, the lost time that females would suffer due to injuries—based on the Army model—is 480% greater than the lost time experienced by males in Army basic training. Tr. 913 (Davis). Despite the higher injury rate for women (and despite the additional disability leaves associated with pregnancy), a 1978 Navy study found that male soldiers are, on the average, more likely to be absent from duty a particular time, principally because men are much more likely to be suspended for disciplinary related reasons. U.S. Ex. 18.

14. Comparison of the United States Military Academy classes of 1989 and 1981 male and female cadets on the Army physical fitness tests, USMA indoor obstacle course test, and the USMA physical ability test, shows the following:

(a) Seven of eight physical tests show half (50th percentile) of the women performed below the bottom five percent of the men. The single exception is the Army physical fitness sit-up test, which was almost identical for the two groups.

(b) Three-quarters (75th percentile) of the women performed below the bottom five percent of the men in the indoor obstacle course and physical ability test push-up, standing long jump, modified basketball throw, and 300-yard shuttle run test.

(c) The 75th percentile of women for the class of 1989 Army physical fitness test push-up performance was equal to the 8th percentile performance for the men; and the 75th

percentile women for the class of 1981 performance was equal to the 13th percentile performance for the men.

(d) For the Army physical fitness test two-mile run, the 75th percentile women for the classes of 1989 and 1981 performance was equal to the 22nd and 13th percentile men, respectively.

VMI Ex. 157.

15. West Point has concluded that males outperformed the females on all of the common physical aptitude tests, and that competition between the two groups on the basis of raw scores would severely limit the admission opportunities for women. VMI Ex. 166, at 3.

B. *Gender-Based Developmental Differences*

1. According to Dr. Richardson, the "nature of an experience that is growth-producing for a majority of women, according to the literature, is one that is supportive, is one that emphasizes positive motivation. I'm not saying that some women don't do well under adversative model, undoubtedly there are some who do, but you [do not] design educational experiences around the exception. You have to design them around the rule, and I think you would find that the doubting model . . . the adversative model . . . would have to be gradually adapt[ed] so that it incorporated more of the positive motivation, positive reenforcement." Tr. 702.

2. A substantial body of contemporary scholarship and research supports the proposition that, al-

though males and females have significant areas of developmental overlap, they also have differing developmental needs that are deep-seated. VMI Ex. 73; Tr. 376-77 (Conrad), 686-87, 692-93 (Richardson); Riesman Dep. 13, 57-67.

3. The literature regarding developmental differences between males and females and the advantages of single-sex education contained in VMI Ex. 73 reflects the work of only a small portion of the academics who, in recent years, have suggested that there are important differences between men and women in learning and developmental needs. Tr. 376-77 (Conrad).

4. Given these developmental differences females and males characteristically learn differently. Males tend to need an atmosphere of adversativeness or ritual combat in which the teacher is a disciplinarian and a worthy competitor. Females tend to thrive in a cooperative atmosphere in which the teacher is emotionally connected with the students. Riesman Dep. 63-65, 95, 106-07; Tr. 684-87, 692-93 (Richardson); VMI Ex. 73B, D, E, and G.

5. Commenting on the scholarly literature and empirical evidence that single-sex education is desirable in light of gender-based developmental differences, the government's expert, Dr. Conrad, described the gender differences identified by researches as "tendencies." He emphasized that the attributes of males and females *in individual cases* may diverge from these average tendencies. In other words, there are exceptions to the general rule. Tr. 377, 380 (Conrad).

6. Colonel Toffler of West Point has observed the psychological and sociological differences between

males and females during his study of the integration process at West Point. He attributes the slightly higher attrition rates for females at West Point, in part, to gender-based sociological differences. West Point attempts to accommodate the distinctive psychological and sociological needs of women. The psychological and sociological differences between men and women are real differences, not stereotypes. Tr. 513-16, 519, 545-50 (Toffler).

7. During his trial testimony, Dr. Conrad not only acknowledged the broad empirical support for the value of single-sex education, and also described himself as a "believer in single-sex education." Dr. Conrad commented that single-sex education has great virtues for many people under many conditions. Tr. 373. In response to a question from the Court, Dr. Conrad stated that his advocacy of coeducation at VMI was based on a philosophical preference for openness in public institutions, and not on considerations of educational quality. Tr. 382.

8. Single-sex educational opportunities are valuable for both males and females. For many men, a single-sex college is optimal. At an all-male college, adolescent males benefit from being able to focus exclusively on the work at hand, without the intrusion of any sexual tension. Riesman Dep. 38-39; Tr. 986-87 (Bunting).

9. Single-sex schools for adolescent men are effective where discipline is maintained and sound role models are present. Riesman Dep. 95, 107; Tr. 693 (Richardson).

10. According to the research of Alexander Astin, based on data from the early 1970's, single-sex colleges show a pattern of effects on both sexes that is

almost uniformly positive. Students of both sexes become more academically involved, interact with faculty frequently, show larger increases in intellectual self-esteem and are more satisfied with practically all aspects of college experience (the sole exception is social life compared with their counterparts in coeducational institutions). Men's colleges substantially increase the likelihood that men will carry out career plans in law, business and college teaching; they also have a substantial positive effect on starting salaries in business. Women's colleges increase the chances that women will obtain positions of leadership, complete the baccalaureate degree, and aspire to higher degrees. Alexander Astin, *Four Critical Years*, (1977); admitted as VMI Ex. 73I.[3]

11. Astin's research indicates that students are able to invest more energy in academic pursuits and in interaction with faculty in single-sex colleges because they have few opportunities to dissipate energy in courtship activities. In all likelihood, heterosexual activity is more circumscribed—confined to weekends, for example—in single-sex colleges. VMI Ex. 73I, K, L, M, P, Q, and R; Riesman Dep. 54, 109; Tr. 986 (Bunting).

12. Research also shows that students attending single-sex colleges are more likely to take the risk of choosing a career normally associated with the other sex than are students in coeducational colleges. Marvin Bressler and Peter Wendell, "The Sex Composition of Selective Colleges and Gender Differences in Career Aspirations," 51 *Journal of Higher Education* 650 (1980); admitted as VMI Ex. 73J.

[3] Astin's research was cited favorably by Justice Powell in his dissenting opinion in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 738-39, 102 S.Ct. 3331, 3343, 73 L.Ed.2d 1090 (1982). The volume was properly admitted as a trial exhibit in this case.

13. Astin has written that, with respect to single-sex colleges as compared to coeducational colleges, the greater interaction with faculty and greater satisfaction with the collegiate experience, despite the constraints on social life, may result from the greater sense of identification and communal feeling when both students and faculty are predominantly of the same sex. VMI Ex. 73I; *see also* VMI Ex. 73K, L. M, and Q.

14. Single-gender schools facilitate their students' focusing on education by screening out distractions. Thus, the single-gender nature of VMI is directly related to its goal of focusing cadets' energies on development of leadership values. Tr. 694, 729-31 (Richardson); Riesman Dep. 54, 62-63, 94.

VIII. *Anticipated Effects of Coeducation on VMI*

1. A coeducational VMI would offer neither males nor females the VMI education that now exists. The changes would substantially affect the method now used to educate citizen-soldiers. Tr. 804 (Bissell), Dep. 101 (Riesman), 676-77 (Richardson).

2. Colleges that face a major change in clientele typically change their methods in three stages:

> The first stage involves removal of the barriers that barred a particular group or class of students from admission.
>
> The second stage involves efforts to help the new class of students succeed, through such

measures as recruitment efforts and support services.

The third and final stage involves recognition that the institution cannot attract sufficient numbers of the new class of students to make their experience beneficial without modifying the institutional experience. As a result, at this third stage, the institutional experience, even its mission, is altered in order to conform to the developmental needs of the changed clientele.

Tr. 696-98 (Richardson).

3. The admission of women at VMI would represent a "dramatic clientele change." Tr. 368 (Conrad).

A. *Demand for VMI Education Among Women*

1. Trial testimony included a great deal of speculation, but very little evidence, on demand for a VMI education among women. This uncertainty is due to a lack of recruitment among women.

2. VMI engages in extensive recruiting activities, including visiting high schools to "spread the word about the valuable education" it offers. Tr. 42 (Knapp).

3. Alumni also perform substantial recruitment activities. Their efforts to date have been aimed exclusively at male applicants. Tr. 172 (Sandy).

4. Typically, VMI representatives set up tables at high schools and offer materials regarding VMI. Women who stop by are told that VMI accepts only male applicants. VMI does not keep any records of either the names or the number of women who stop by. Tr. 44 (Knapp).

5. In the past, VMI responded to inquiries from females by sending letters explaining VMI's male-only admissions policy. In the last two years, Lt. Col. Sandy has been instructed not to respond in any fashion to inquiries from females. Women who send written inquiries to VMI now receive no response at all. Tr. 193-94.

6. Between 1988 and 1990, VMI received inquiries, test scores, or other requests for information from 347 women. Because VMI did not respond to them, the seriousness of these inquiries cannot be determined. U.S. Ex. 104, 105.

B. *VMI's Special Recruitment of Blacks*

1. VMI has distributed a recruitment booklet aimed specifically at black students. U.S. Ex. 79. VMI also attends specific programs for minority students, purchases names from the college board of black students with SAT scores sufficient for admission to VMI, and targets specific high schools to recruit black students. VMI targets black students because it likes "to have students of different backgrounds, racial backgrounds, ethnic backgrounds in the school," and because recruiting black students is one of the objectives set forth by the State Council on Higher Education. Tr. 173-74 (Sandy).

2. Some special steps are taken to address the needs of black students. VMI's 1990-91 budget includes $22,000 for expenditures on "Retention of Black Cadets." U.S. Ex. 3 at 28.

VMI's self-study reported:

A program for the retention and effective performance of black freshmen was initiated in the

fall of 1983. The primary objective was to insure the students' success in the basic disciplines of mathematics and English. The program is thus designed primarily to offer the student crucial academic support. Experience gained during the first year of the Cadet Retention Program indicates that black freshmen also need and certainly will appreciate, outside a formal academic context, opportunities to discuss their shared experiences as new, minority members of a dominantly white and tradition-oriented student body. This apparent need and the similar one of other black cadets is also addressed. . . . Social-cultural support and black student morale within a dominantly white institution are important secondary concerns of the program.

U.S. Ex. 24, at 57-61.

3. VMI offers a three-week college orientation workshop to black (male) high school students. The program is intended to get students interested in going to college in general, and in attending VMI in particular. The students live in the barracks, attend classes, and go through demanding physical training "to show them what it might be like at VMI." Tr. 308, 312-13 (King).

4. The Promaji Club, one of about 70 extracurricular clubs at VMI, is organized as a club following the interests of black cadets. Like all clubs at VMI, it is open to all students. U.S. Ex. 79 at 8; Tr. 49 (Knapp).

5. VMI is currently about 7% black. The special recruitment program for blacks has had little, if any, effect on VMI's method of accomplishing its mission.

Black cadets particularly appreciate the egalitarianism of VMI. Tr. 46-48 (Knapp); Riesman Dep. 79, 81-83.

C. *Recruitment of Women at Other Military Institutions*

1. Currently, approximately 250 women attend residential ROTC military programs, which are based at Texas A & M University, Norwich University, North Georgia College and VPI. VMI Ex. 62L.

2. Four hundred sixty-one women are enrolled at West Point, 423 at the Naval Academy, 532 at the Air Force Academy, and 131 at the Coast Guard Academy. These institutions feature a military curriculum. However, they differ from VMI both in their mission and in that they do not have admission fees and, in fact, pay student salaries while they are enrolled.

3. Dr. Richardson testified that he believed that successful recruitment of women would likely yield VMI a cadet corps of approximately 10% women, or 130 women. This number is apparently based on the experience at West Point, which offers a very different kind of program and has much higher academic standards. Dr. Richardson conceded that the number is highly speculative. Tr. 720-21.

4. Expert estimates of the number of women necessary to provide a good educational environment for women at a formerly all-male school range from 10% to 40%. The 40% figure appears in an October 1990 Report of the Committee on Women's Issues of the United States Naval Academy Board of Visitors, which has a significantly lower number of women at this time. VMI Ex. 67 at 11. The 10%

figure is based on the positive West Point experience, and was accepted by VMI's Mission Study Committee. Tr. 486-87 (Toffler); Stip. 7; VMI Ex. 40 at 2.

5. Of the 1,946 women who applied for admission to West Point in the class of 1992, only 155 were admitted. The female applicants not admitted did not meet the qualifications for admission. The capacity for the class was filled, and in the opinion of the Admissions Committee, filled with the best-qualified applicants, and the high-competition objectives and class objectives had been satisfied. Tr. 484-85 (Toffler).

6. Currently, many men who are denied admission to the federal service academies meet the admissions standards of VMI. However, VMI has found that very few rejected applicants from West Point choose to attend VMI. Tr. 204-05 (Sandy).

7. The federal military academies limit the admission of female students by placing a cap on the number of such students who can be admitted in any one year. The cap is equivalent to the percentage of women presently on active duty in the branch of the armed forces represented by the particular academy. Approximately 10% of the cadets at West Point are women. Stip. 196; Tr. 482 (Toffler).

8. Based on the fragmentary evidence, including VMI's experience with recruitment of blacks, it appears that VMI would be able to achieve at least 10% female enrollment while maintaining its ROTC requirements. This would be a sufficient "critical mass" to provide the female cadets with a positive educational experience.

D. *Need for Privacy*

1. If VMI were to admit women, there would be changes in the barracks culture. Adaptations would have to be made in order to provide for individual privacy, for the sake of the men as well as for the sake of the women. Tr. 367 (Conrad); Riesman Dep. 61-62.

2. The introduction of privacy required by admission of women at VMI would contradict the principle that everyone is constantly subject to scrutiny by everyone else. The honor code would cease to be the absolute boundary between VMI and the outside world because it would become possible for cadets to take action at VMI without being observed. Tr. 701.

E. *Physical Education*

1. If women were admitted to VMI, it would be necessary to change certain physical training program courses and to set different standards. Unlike the federal services academies, VMI currently does not use "ability groups" in its physical programs or activities. VMI imposes the same physical requirements on a 150-pound cadet as on a 190-pound cadet. Tr. 788-89 (Bissell).

2. Changes in the physical education program would be necessary if women were admitted at VMI. For example, boxing and wrestling requirements would have to be changed, as would certain aspects of the rat training programs. Either these would have to be abandoned, or there would have to be accommodations that would result in a dual track for women. Tr. 35, 66-67 (Knapp), 896-98 (Davis), 788-89 (Bissell).

3. Currently, 98% of VMI cadets pass the physical fitness test before graduation. Assuming an ap-

plicant pool similar to that at the military academies, approximately 15% of females in the applicant pool could successfully meet the requirements of the current VMI physical fitness test.

4. The goal of physical testing is to design a single program or criteria in such a way as to insure that it represents a reasonable challenge to the greatest number of individuals. Because of the physiological differences between male and female cadets, it would not be possible to design a program that would be challenging to both sexes if it were a coeducational program. A program that would challenge but not discourage female cadets would pose an insufficient challenge for the vast majority of males. Tr. 898-900 (Davis).

5. Female cadets would not be able to perform the tasks in the VMI rat training program at a level comparable to that of male cadets. Because of physiological differences, the majority of females would not be able to complete the tasks associated with the rat line as currently constructed, at the same levels as males. Tr. 906 (Davis).

6. If VMI were coeducational and females were subjected to the same physical demands as male cadets, females would suffer on the order of 300% more injuries than males. Tr. 902-07 (Davis).

7. The intensity and aggressiveness of the current program would be reduced if women were admitted and requirements for all cadets were adjusted, and rat training would have to undergo extensive changes. The program's benefit to the morale of male participants would be adversely affected. Tr. 918-22, 930-32 (Davis).

F. *Armed Forces Experience*

1. The Marine Corps trains males and females in separate units at boot camp. The Marine Corps tried using a gender-integrated platoon in officer basic training, but found the experience inferior. One concern was that the program became insufficiently rigorous for males. Tr. 818-19 (Ripley).

2. The Marine Corps also trains men and women in separate summer camps as part of the Marine Corps ROTC program. Tr. 819 (Ripley).

3. The U.S. Army segregates men and women in basic training at the platoon level. They are integrated at the company level. The Army looked at a variety of combinations and determined that segregation was appropriate for basic soldier training. Tr. 616 (Toffler), 786-788 (Bissell).

C. *West Point Experience*

1. When Congress passed a statute requiring the federal service academies to admit females, it directed the academies to make the adjustments necessary to accommodate the physiological differences between men and women. Tr. 510-11 (Toffler).

2. Since admitting women, West Point has modified basic training to break it into groups according to ability. Tr. 601-03 (Toffler).

3. Since the admission of women, West Point has adopted the concept of comparable or equivalent training. The physical activities assigned to women and to men differ, but have comparable training benefit for the people who go through them. An example would be boxing for males versus self-defense or judo for females. Another example is pull-ups for males versus the flexed arm hang for females. Tr. 609-10 (Toffler).

4. Prior to the admission of women, recondo training (i.e., various strenuous activities, including a forced march with a pack) was part of cadet field training. Recondo training is no longer conducted during field training. Tr. 606-07 (Toffler).

5. Prior to the admission of women, running exercises were conducted wearing combat boots. Subsequently, a change was made so that running exercises were conducted in running shoes. Prior to the change, women were suffering a significantly higher injury rate in cadet basic training. Tr. 608-09 (Toffler).

6. Since women have been admitted at West Point, physical training no longer includes running events in which cadets carry weapons. Tr. 604-06 (Toffler).

7. Since the admission of women, the indoor obstacle course that cadets run as part of their training has been modified to remove certain events and replace them with others. The events that were removed were events that required upper body strength. One of the reasons these events were eliminated was concern that women would be psychologically discouraged by them. Tr. 607-608 (Toffler).

8. If women were admitted to VMI, there would be changes in physical education requirements to reflect physiological differences. Coeducation would also affect physical training, which is incorporated into the rat system. Tr. 366 (Conrad).

9. At VMI, there are intense physical demands placed on cadets. Given the biological differences between men and women, changes would have to be made to adapt the physical demands to the capabilities of women. VMI would have to make the changes analogous to those that have been made at the service academies, and might find it necessary to introduce the concept of comparable training used at West Point. Tr. 366-67 (Conrad).

H. *Impact of Gender Classes*

1. The VMI experience is based on absolute equality, which is achieved through treating everyone in exactly the same way. VMI Ex. 58 (Richardson Report) at 22.

2. There are approximately 66 approved clubs at VMI. Consistent with the egalitarian ethic, VMI prohibits the exclusion of any cadet from membership in any club. VMI also has a policy that prohibits fraternities and secret societies. The significance of those policies lies in "the egalitarian aspect that every cadet must be exactly the same, treated alike and attend or go to any club or facilities that may be available to them, but a total egalitarian approach." Tr. 790-91 (Bissell).

3. Given the actual physiological, psychological, and sociological differences between males and females, it would be impossible to treat everyone fairly by continuing to treat them the same if women were admitted to VMI. Equal treatment would necessarily give way to fair treatment, thus undermining egalitarianism. Tr. 698, 701-02 (Richardson).

4. If women were admitted to VMI, class differences between male and females would be introduced. These differences would appear in physical training. Tr. 367-68 (Conrad).

5. If women were admitted to VMI and housed in a separate barracks, they would miss the VMI experience. It would provide women with an undesirable experience in which their second-class citizenship would be emphasized. Some military institutions that

have tried housing women in separate quarters, and found that it simply does not work. In order to achieve results satisfactory to them, they must be integrated rather than isolated from the experience. Tr. 706 (Richardson).

6. The admission of women at VMI would undermine the ethic of egalitarianism by creating jealousies and concerns about whether people were being treated equitably. Cross-sex relationships, dating, and aspirations are attributes of a coeducational system, and are inconsistent with the complete equality that is a central attribute of the VMI system. Tr. 731 (Richardson); Riesman Dep. 60-61.

7. Since the admission of female cadets at West Point, studies have consistently shown that cadets of both sexes perceive treatment as unequal. This perception gives rise to jealousy and resentment among cadets. Tr. 518-19 (Toffler); VMI Ex. 91, 92, 103.

8. Survey data compiled by West Point indicates that some cadets do not accept the concept of comparable or equivalent training because they resent the fact that they have to do something at one level while another person does not have to meet the same standard. Tr. 610-11 (Toffler).

I. *Impact of Cross-Sex Relationships*

1. Dr. Richardson testified: "[VMI] does what it does because it has an isolated cloistered environment that focuses on a very narrow range of purposes. . . . [It] uses a developmental process that is attuned to male developmental needs during the period of adolescence. [The admission of women would] inject . . . into that environment the necessity of coping with cross sex relationships, . . . especially at a very vulnerable period of development [when] people are in fact trying out the relationships that will characterize their future life in society. . . . [The VMI system] considers only how you develop a particular gender and it is focused in every part on . . . optimizing that development." Tr. 729-30.

2. Admission of women at VMI would produce cross-sex relationships among cadets that would significantly alter the character-building and leadership-development aspects of the VMI experience. Tr. 700-01 (Richardson).

3. Cross-sex interaction and relationships would inject a new and distracting developmental aspect into an environment at VMI that currently excludes that aspect and focuses narrowly upon other aspects of development. Tr. 700-01, 729-31 (Richardson).

4. Equal treatment is much more likely to be obtained in a single-sex setting. Cross-sex relationships, dating, and aspirations are attributes of a coeducational system, and are inconsistent with the complete equality that is a central attribute to the VMI system. Riesman Dep. 60-61.

J. *West Point Experience*

1. The VMI Mission Study Committee determined that integration of women at West Point was made possible by the Academy's move away from its adversative new cadet system to a much more developmental style of training and emphasis on positive leadership. The change coincided with Army-wide changes in leadership style. U.S. Ex. 68.

2. The first women were admitted to West Point in the summer of 1976 and graduated with the class of 1980. The admission of women, at that point, resulted from legislation signed by the President in

1975. Prior to that time, West Point's position on the admission of women was one of opposition. Tr. 482-83 (Toffler).

3. At West Point, dating between cadets is generally permitted except that fourth class cadets must date within their class and all cadets are precluded from dating within the chain of command. West Point has conducted no study to determine the impact of dating on the discipline of the Corps of Cadets. Tr. 623-25 (Toffler); VMI Ex. 146 at 2-3.

4. The doors at West Point on cadet rooms are solid and equipped with locks. Cadets are permitted to close their doors unless there are only two cadets in the room at a particular time and the cadets are of the opposite sex. Tr. 627-28 (Toffler).

5. West Point regulations require that a person desiring entry to a cadet's room must knock and await acknowledgment before entering. VMI Ex. 146 at 2-4.

6. At West Point and Virginia Tech, unlike VMI, there are doors on the toilet partitions separating the toilets. Tr. 432-33 (Brewer).

7. West Point is not concerned with eliminating all visible financial distinctions among cadets. Tr. 626-27 (Toffler).

8. West Point abolished the new cadet system, or fourth class system, in 1990. Under the current program, fourth class cadets are assigned a faculty member as mentor. After cadet basic training, which is the 6-8 weeks before the start of the academic year for new cadets, West Point has reduced the amount of memorizing and reciting information about West Point's history and traditions by new cadets. West Point has also acted to eliminate practices such as upperclassmen yelling at and disciplining new cadets, requiring them to run personal errands, bracing (sitting with chin tucked in the cavity of one's neck) during meals, and requiring physical activities such as push-ups. Tr. 616-20 (Toffler).

9. With the admission of women, West Point modified regulations relating to uniforms, hair length and jewelry, Tr. 625-26 (Toffler).

10. Under West Point's regulations, if a subordinate believes that a senior is operating improperly, it is within their place to discuss that with the senior. Tr. 595-96 (Toffler).

11. Hazing of new cadets, including demeaning or insulting activity, and requiring excessive physical performance, are examples of improper senior-subordinate interaction, which are not permitted at West Point. Though such interactions were technically improper prior to 1990, they were common practices and were part of the new cadet system. Since 1990, the prohibition on these activities has been enforced. Tr. 619-23 (Toffler).

12. The abolition in 1990 of new cadet, or fourth class, system at West Point, and the substitution of a new system, were designed to eliminate the application of stress upon fourth class cadets by more senior cadets. The new system uses positive motivation, instead of stress, as a means of leadership development. The new leadership development is designed to function for all four years of the educational experience, rather than being focused upon the first year.

K. *Educational and Military Systems*

1. Experts are in general agreement that coeducation would have little or no effect on ROTC program

at VMI. If anything, the VMI ROTC experience would become a better training program from the perspective of the armed forces, because it would provide training in dealing with a mixed-gender army. U.S.Ex. 68.

2. Coeducation would have some effect on the educational programs at VMI. For example, women might suggest different reading in literature courses. This effect would not be likely to change either the quality or the mission of VMI. Tr. 365-66 (Conrad).

L. *ROTC Programs*

1. To enroll in the Air Force ROTC program, a cadet must pass the Air Force officer qualifying test, a 5½ hour test that resembles the SAT. This is the same test administered to every Air Force officer candidate throughout the United States. The test can be retaken up to three times, with six-month intervals between each. About 15% of the cadets fail the test the first time. Tr. 218-20 (Williams).

2. Cadets must also pass a physical, which is set by the Department of Defense and administered to all applicants for commissioning in the armed forces. Tr. 222.

3. The academic requirements for VMI's Air Force ROTC program are the same as those at any other undergraduate institution in the United States. Tr. 223.

4. The Air Force ROTC program also includes weekly leadership labs, which is partially waived at VMI because VMI "picks up the responsibilities for training our cadets on the techniques of marching, drill, those type of things." Leadership lab is required by the Air Force of all ROTC cadets. Tr. 223-24 (Williams).

5. The Air Force ROTC physical fitness test given to VMI cadets is the same test that is administered by any other undergraduate institution of higher education which offers ROTC to all students in that program. If a cadet cannot pass the physical fitness test by the end of his sophomore year, he cannot attend the summer field training. If he does not attend the field training, he cannot become an officer. The Air Force sets the requirements for the physical fitness test. With the exception of pull-ups, women and men perform the same events in this test; women do the flex arm hang rather than pull-ups. Scoring of the events is different for men and women. Tr. 225-29 (Williams).

6. The summer field training program is a "four-week summer encampment," and he likened it to "a modified rat line." Women attend the same camps, are subject to the same "modified rat line," participate in the leadership reaction course work, and participate in the other physical training he described. Approximately 25 to 30 female ROTC students would participate in the same training as men at each summer camp at each base. Thus, VMI cadets attend and take the summer camp training side by side with females. Tr. 229-32 (Williams).

7. Students in the University of Virginia's Army ROTC program are required to take certain ROTC classes, including a leadership laboratory once a week, as well as a two-day field training exercise each semester. They are required to participate in a physical training program of their own choosing. Each semester they must take and satisfactorily complete the Army physical training test. Tr. 247-48 (Randall).

8. All ROTC students must take and pass the Army physical fitness examination several times, including prior to summer training camp. Tr. 249-50, 253. Male and female students take the ROTC academic courses, and do the same exercises for the physical fitness exam. Tr. 254. Standards for the physical fitness examination differ by age and sex. Tr. 253 (Randall).

9. Cadets must attend the summer training camp between their junior and senior year. The six-week evaluation and training program is "very strenuous." Both male and female ROTC students participate in summer camp training, both are subject to the same physical and psychological stress, and both successfully complete the program. Tr. 257-62 (Randall).

10. Seventy-four students participate in the Army ROTC program at the University of Virginia (UVA), 11 of whom are females. Tr. 253-54 (Randall).

11. The Air Force ROTC requirements at UVA are substantially the same as those at VMI. UVA Air Force ROTC students participate in the summer training camp as VMI cadets, and female students successfully complete the program. Tr. 273, 275. Of 90 cadets participating in the UVA Air Force ROTC program, 19 are females. Tr. 273 (Stickell).

M. *Physical Facilities*

1. Defendants stipulated that "the VMI Barracks can be altered from a physical point of view to accommodate females." Tr. 414 (statement of counsel).

2. At West Point, male and female cadets occupy identical rooms side by side in the barracks. There are no designations as to which rooms are occupied

by males or females, and separate gang shower rooms and gang toilet rooms are used by males and females. There are no differences between the facilities for men and women. Tr. 421-23 (Brewer).

3. With the exception of the fact that cadets at VMI roll up their mattresses during the day, the cadet rooms at VMI are similar to the cadet rooms at West Point. Tr. 424 (Brewer).

4. At VPI, there are two cadet residence halls. Male and female cadets occupy the same floors and, in some instances, they have rooms adjacent to one another. Separate but identical gang shower and toilet facilities are used by male and female cadets. One gang shower and toilet room was used by both male and female cadets, at different times. When women use this facility, a sign entitled "women" is hung on the door. Tr. 425-27 (Brewer).

5. There are no differences in the physical accommodations for VPI cadets on the basis of gender. All cadet rooms are identical. Tr. 426, 469 (Brewer).

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1667
(CA-90-126-R)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

versus

COMMONWEALTH OF VIRGINIA; GEORGE F. ALLEN, Governor, of the Commonwealth of Virginia; VIRGINIA MILITARY INSTITUTE; JOSEPH M. SPIVEY, III, President of the Virginia Military Institute Board of Visitors; JOHN WILLIAMS KNAPP, Superintendent of Virginia Military Institute; THE BOARD OF VISITORS OF VIRGINIA MILITARY INSTITUTE; VMI FOUNDATION, INCORPORATED; VMI ALUMNI ASSOCIATION; THE VIRGINIA STATE COUNCIL OF HIGHER EDUCATION AND ITS MEMBERS AND OFFICERS; THOMAS N. DOWNING; ELIZABETH P. HOISINGTON, Brig. Gen.; ROBERT Q. MARSTON; A. COURTLAND SPOTTS, III; DANIEL F. FLOWERS; B. POWELL HARRISON, JR.; ROBERT H. SPILMAN; SAMUEL E. WOOLWINE; JAMES W. ENOCHS, JR.; WILLIAM A. HAZEL; HARVEY S. SADOW; DOUGLAS K. BAUMGARTNER; DANIEL D. CAMERON; GLEN N. JONES; JOHN W. ROBERTS, DEFENDANTS-APPELLEES

and

GORDON K. DAVIES, DEFENDANT

THE NATIONAL WOMEN'S LAW CENTER; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN CIVIL LIBERTIES UNION; CALIFORNIA WOMEN'S LAW CENTER; CENTER FOR WOMEN POLICY STUDIES; CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND; EQUAL RIGHTS ADVOCATES; FEDERALLY EMPLOYED WOMEN, INC.; FEMINIST MAJORITY FOUNDATION; HUMAN RIGHTS CAMPAIGN FUND; LAWYER'S COMMITTEE FOR CIVIL RIGHTS UNDER LAW; NATIONAL ASSOCIATION FOR GIRLS & WOMEN IN SPORT; NATIONAL ASSOCIATION OF COMMISSIONS FOR WOMEN; NATIONAL COUNCIL OF NEGRO WOMEN; NATIONAL EDUCATION ASSOCIATION; NATIONAL GAY AND LESBIAN TASK FORCE; NATIONAL HOOKUP OF BLACK WOMEN; NATIONAL ORGANIZATION FOR WOMEN; NOW LEGAL DEFENSE AND EDUCATION FUND; NATIONAL WOMEN'S CONFERENCE COMMITTEE; NATIONAL WOMEN'S PARTY; NORTHWEST WOMEN'S LAW CENTER; TRIAL LAWYERS FOR PUBLIC JUSTICE; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; YWCA OF THE U.S.A.; MARY BALDWIN COLLEGE; WELLS COLLEGE; SAINT MARY'S COLLEGE; SOUTHERN VIRGINIA COLLEGE, AMICI CURIAE

No. 94-1712
(CA-90-126-R)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

COMMONWEALTH OF VIRGINIA; GEORGE F. ALLEN, Governor, of the Commonwealth of Virginia; VIRGINIA MILITARY INSTITUTE; JOSEPH M. SPIVEY, III, President of the Virginia Military Institute Board of Visitors; JOHN WILLIAMS KNAPP, Superintendent of Virginia Military Institute; THE BOARD OF VISITORS OF VIRGINIA MILITARY INSTITUTE; VMI FOUNDATION, INCORPORATED; VMI ALUMNI ASSOCIATION; THE VIRGINIA STATE COUNCIL OF HIGHER EDUCATION AND ITS MEMBERS AND OFFICERS; THOMAS N. DOWNING; ELIZABETH P. HOISINGTON, Brig. Gen.; ROBERT Q. MARSTON; A. COURTLAND SPOTTS, III; DANIEL F. FLOWERS; B. POWELL HARRISON, JR.; ROBERT H. SPILMAN; SAMUEL E. WOOLWINE; JAMES W. ENOCHS, JR.; WILLIAM A. HAZEL; HARVEY S. SADOW; DOUGLAS K. BAUMGARTNER; DANIEL D. CAMERON; GLEN N. JONES; JOHN W. ROBERTS, DEFENDANTS-APPELLANTS

and

GORDON K. DAVIES, DEFENDANT

THE NATIONAL WOMEN'S LAW CENTER; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN CIVIL LIBERTIES UNION; CALIFORNIA WOMEN'S LAW CENTER; CENTER FOR WOMEN POLICY STUDIES; CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND; EQUAL RIGHTS ADVOCATES; FEDERALLY EMPLOYED WOMEN, INC.; FEMINIST MAJORITY FOUNDATION; HUMAN RIGHTS CAMPAIGN FUND; LAWYER'S COMMITTEE FOR CIVIL RIGHTS UNDER LAW; NATIONAL ASSOCIATION FOR GIRLS & WOMEN IN SPORT; NATIONAL ASSOCIATION OF COMMISSIONS FOR WOMEN; NATIONAL COUNCIL OF NEGRO WOMEN; NATIONAL EDUCATION ASSOCIATION; NATIONAL GAY AND LESBIAN TASK FORCE; NATIONAL HOOKUP OF BLACK WOMEN; NATIONAL ORGANIZATION FOR WOMEN; NOW LEGAL DEFENSE AND EDUCATION FUND; NATIONAL WOMEN'S CONFERENCE COMMITTEE; NATIONAL WOMEN'S PARTY; NORTHWEST WOMEN'S LAW CENTER; TRIAL LAWYERS FOR PUBLIC JUSTICE; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; YWCA OF THE U.S.A.; MARY BALDWIN COLLEGE; WELLS COLLEGE; SAINT MARY'S COLLEGE; SOUTHERN VIRGINIA COLLEGE, AMICI CURIAE

[Filed Apr. 28, 1995]

ORDER

A member of the Court requested a poll on whether to rehear this case en banc. The poll failed to produce a majority of the court in favor of rehearing.

Chief Judge Ervin and Judges Hall, Murnaghan, Wilkins, Michael and Motz voted to rehear this case en banc; Judges Russell, Widener, Niemeyer and Hamilton voted against rehearing this case en banc. Judges Wilkinson, Luttig, and Williams disqualified themselves. Judge Motz wrote a separate dissent which is attached.

Entered at the direction of Judge Niemeyer for the Court.

For the Court,

/s/ Bert M. Montague
Clerk

DIANA GRIBBON MOTZ, Circuit Judge, dissenting from denial of rehearing *en banc*:

More than forty years ago the Supreme Court unanimously held that a state could not constitutionally provide a "separate but equal" education to African-Americans. Yet in a 2-1 decision, a panel of this court has now held that a state can constitutionally provide a separate—*and concededly not even equal*—education to women. In my view, this holding is one of exceptional importance, which merits the careful consideration of every eligible member of the court.[1] Accordingly, I respectfully dissent from the denial of rehearing *en banc*.

Judge Phillips' thoughtful dissenting opinion on the merits of this case and Judge Hall's memorable concurring opinion in *Faulkner v. Jones*, No. 94-1978, slip op. at 25-27 (4th Cir. 1995) (Hall, J. concurring) set forth many of the reasons why I believe rehearing is warranted here. To them, I add the following thoughts.

The panel majority asserts that the Commonwealth must meet a three prong test: (1) the state's objective must be " 'legitimate and important,' " (2) there must be the " 'requisite direct, substantial relationship between objective and means,' " and (3) there must be "substantive comparability of the mutually

---

[1] A majority of my non-recused colleagues in active service agree with this assessment and have voted to hear the case *en banc*. Our local rule, which permits rehearing *en banc* only on the vote of a "majority of the circuit judges who are in regular active service . . . . without regard to whether a judge is disqualified," in this case allows the votes of four, voting against rehearing *en banc*, to defeat the votes of six, voting for rehearing *en banc*. *See* Local Rule 35(b).

exclusive programs provided to men and women." *United States v. Commonwealth of Virginia*, 44 F.3d 1229, 1235, 1237 (4th Cir. 1995) (*VMI II*) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). Assuming this is the correct constitutional standard,[2] the panel majority's application of that standard to the facts of this case is confused and contrary to both law and logic.

First, the panel majority appears to identify as the Commonwealth's "legitimate and important" objective the provision of "single-gender education." *See VMI II*, 44 F.3d at 1237 (the first step is "whether the state's objective of providing single-gender education to its citizens may be considered a legitimate and important governmental objective"; the first inquiry is "whether single-gender education constitutes a legitimate and important governmental objective"). However, in *Hogan* the Supreme Court expressly held that the single-gender admissions policy of a state-supported nursing school violated the Equal Protec-

[2] It well may be that classifications based on gender, like those based on race or national origin, must be subjected to strict scrutiny. The Supreme Court has never so held, but only a few months ago the Court reminded us that whether classifications based on gender are inherently suspect and so subject to strict scrutiny is an "open question." *J.E.B. v. Alabama ex rel. T.B.*, 510 U.S., ——, —— n.6, 114 S. Ct. 1419, 1425 n:6 (1994) (quoting *Harris v. Forklift Systems*, 510 U.S. ——, ——, 114 S. Ct. 367, 373 (1993) (Ginsburg, J. concurring)). *See also, Hogan*, 458 U.S. at 724 n.9. Not even the panel majority suggests that the Commonwealth's proposal—to continue funding VMI, yet prohibit women from attending simply because they are women, and instead provide them with a leadership program 35 miles away—could be justified by a compelling state interest or withstand strict scrutiny. It is clear that it could not.

tion Clause. 458 U.S. at 731. The *Hogan* Court may, as the panel majority suggests, have left open the question of whether states could provide single-gender education "in other circumstances," but it clearly did not leave open the question of whether a state-supported single-gender educational program can be constitutionally justified simply because it is a single-gender program. The panel majority itself acknowledges that a "state may not establish a [gender-based] classification for admission . . . *unrelated* to" the purpose of the sort of education that is being provided. *VMI II*, 44 F.3d at 1238 (emphasis in original). Indeed, it is for this reason that the majority notes that "a classification for . . . [a music] conservatory defined by gender would probably not qualify as an appropriate classification." *Id.* Thus, simply providing single-gender education cannot constitute a state's legitimate and important objective for excluding one gender from a state-financed institution.[3]

Rather, there must be some reason why a single gender state-supported institution is necessary to further an important governmental objective. Indeed, those seeking to justify a single-gender admission policy must "carry the burden of showing an 'exceed-

[3] The panel majority views single-gender education as a bona-fide educational "technique," which it well may be in certain circumstances. However, in this case it is, at best, a stratagem to achieve the Commonwealth's real objective—preservation of VMI, with its "adversative" training and culture, from the unwelcome intrusion of women. *See Faulkner v. Jones*, slip op. at 26 (Hall, J., concurring) ("these cases have very little to do with education. They instead have very much to do with wealth, power, and the ability of those who have it now to determine who will have it later.").

ingly persuasive justification'" for it. *Hogan*, 458 U.S. at 724. There has been no such showing here. VMI's stated mission is to produce "citizen-soldiers, educated and honorable . . . who are suited for leadership in civilian life and who can provide military leadership when necessary." *United States v. Commonwealth of Virginia*, 976 F.2d 890, 893 (4th Cir. 1992) (*VMI I*). Nothing suggests, let alone provides an "exceedingly persuasive justification," that VMI's male-only admissions policy and "sexually homogenous environment" are necessary to further this mission; indeed, the co-educational United States military academies graduate far more "citizen-soldiers, educated and honorable . . . who are suited for leadership in civilian life and who can provide military leadership when necessary."

Furthermore, despite the panel majority's abundant rhetoric about "adversative" training, it never demonstrates the "requisite direct, substantial relationship" between VMI's asserted objective—producing "citizen soldiers, educated and honorable"—and the means employed to accomplish that objective. Again, the established experience at the United States military academies strongly suggests there is none. The military academies are apparently able to train soldiers , sailors, and pilots without the benefit of "adversative" training. It might even be argued that, since the military academies have abandoned "adversative" training, the provision of that training to VMI cadets, rather than preparing them to be leaders in today's Armed Forces, affirmatively disadvantaged them for military leadership roles.

Assuming, however, that "adversative" training is both desirable and essential to the VMI program, then the proposed Mary Baldwin program, which

does not include "adversative" training, cannot be "substantively comparable" to the VMI program. If "adversative" training is so critical to the VMI program that it virtually defines it, then a program without "adversative" training can never be "substantively comparable." Conversely, if the proposed program at Mary Baldwin is truly "substantively comparable" to the VMI program, then "adversative" training must not be critical to the VMI program, and so there is nothing to prevent the abolition of "adversative" training and admission of women to VMI.

Even leaving aside "adversative" training, how can a degree from a yet to be implemented supplemental program at Mary Baldwin be held "substantively comparable" to a degree from a venerable Virginia military institution that was established more than 150 years ago? As the majority acknowledges, in almost epic understatement, the alternative degree from Mary Baldwin "lacks the historical benefit and prestige of a degree from VMI." *VMI II*, 44 F.3d at 1241. People do not seek to attend VMI only for the course work or the citizenship and military training. At least as important is VMI's reputation, the opportunity to know and learn from other students, faculty, and graduates, and the ability to rely on those connections and friendships in later life. The proposed alternative program offers no remotely similar, let alone "substantively comparable," experience. Women need not be guaranteed equal "results" in this respect, but the Equal Protection Clause does require equal opportunity to obtain these results, that opportunity is being denied here.

The above constitutes a brief sketch of my problems with the panel majority's analysis. In addition, it is worth noting that the degree of judicial oversight required to implement the projected alternative program at Mary Baldwin makes clear how much remains to be accomplished before the proposed program—feeble as it is—can be converted into reality. In the meantime, VMI would continue its unconstitutional course of action. The district court, even with the supervisory assistance of this court, is simply not equipped to plan, inaugurate, and supervise a wholly novel military-leadership program within the ambience of a respected women's liberal arts college.

The panel majority notes that admission of women to VMI "would deny them the very benefit they sought" because the unique characteristics of VMI's program would be destroyed by coeducation. *VMI II*, 44 F.3d at 1233. No changes in VMI's curriculum and culture would be required, however, and its uniqueness would be fully preserved, if the Commonwealth simply ceased providing the substantial financial support it gives to VMI [4] and proposes to give to the alternative program in order to preserve VMI. Conformity with constitutional requirements would thus be immediately achieved without any judicial involvement and at a substantial saving of taxpayers' money.

Finally, it well may be, as a few members of the task force apparently suggested, that many women do not wish to attend VMI where the intended purpose is "to break down individualism and to instill

[4] It is estimated that this support last year exceeded $10 million.

uniform values" by "grating egos and setting the aggressiveness of one person against another through conflict, egalitarianism, lack of privacy, and stress—both physical and mental." *Id.* at 1239. It seems equally probable that many men would not want to be educated in such an environment. No one is arguing that women—or men—should be forced to attend VMI. The question is can they constitutionally be denied that opportunity when the Commonwealth—with tax dollars from men *and* women—supports the institution. Recently the United States eliminated its rule excluding women from combat duty, explaining that the rule was an "armour-plated ceiling" preventing the advancement of women in the military. Several months ago, one of the first women fighter pilots was killed during a practice run. Anyone who is prepared to do combat for her country—indeed, to be killed in preparation for that combat—should be eligible to apply for what she perceives to be the best possible training. As long as the Commonwealth provides support for VMI, women should be given the opportunity to attend.

Judge Murnaghan and Judge Michael have authorized me to indicate that they join in this dissent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE COMMONWEALTH OF VIRGINIA, *ET AL.*, IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Commonwealth of Virginia's single-sex admissions policy for the Virginia Military Institute and the Virginia Women's Institute for Leadership is constitutional given the findings by both courts below that this policy is substantially related to the achievement of important state objectives.

2. Whether the Commonwealth's policy of providing substantively comparable single-sex educational programs to men and women is constitutional where the programs are not identical in every detail but instead incorporate the judgments of educational experts as to the methodologies that will best achieve the same educational benefits for the women and men in each program.

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BRIEF FOR THE COMMONWEALTH OF VIRGINIA, *ET AL.*, IN OPPOSITION

Respondents the Commonwealth of Virginia, Governor George F. Allen, the Virginia State Council of Higher Education, the Virginia Military Institute, its Board of Visitors and Superintendent, the VMI Foundation, Inc., and the VMI Alumni Association respectfully submit this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

The Commonwealth of Virginia offers students of either gender the opportunity to enroll in a state-supported single-sex college program that is designed to develop leadership and character through a comprehensive system of curricular and co-curricular activities including military training. Male students are offered this opportunity through the

Virginia Military Institute (VMI), an historically all-male undergraduate institution; women students are offered this opportunity through the Virginia Women's Institute for Leadership (VWIL), a state-supported program at Mary Baldwin College (MBC), an historically all-female private undergraduate institution. The question on which petitioner seeks review in this case is whether the Commonwealth's decision to offer this unique combination of single-sex educational opportunities for men and women violates the Equal Protection Clause merely because the VWIL and VMI programs do not use identical educational methods to achieve their admittedly identical goals.

STATEMENT

The petition filed by the Solicitor General glosses over crucial facts found by the district court and approved by the court of appeals below. Because the extensive factual record provides a complete refutation of petitioner's contention that further review is warranted, respondents set forth below a more complete statement of the relevant facts.

A. Background

There are 15 public four-year undergraduate institutions in Virginia; these institutions enrolled 72,819 men and 85,441 women in 1989. Historically, many of these institutions maintained single-sex admissions policies, but nearly all are now coeducational. VMI and VWIL are at present the only single-sex college programs supported directly by the Commonwealth. Pet. App. 10a, 185a-189a.[1]

[1]There are also five private single-sex four-year colleges in Virginia, four of which admit only women and one of which admits only men. The Commonwealth provides financial aid to Virginia residents who attend these and other private colleges in Virginia. Pet. App. 189a-191a.

1. Mary Baldwin College

MBC, the home of the VWIL program, was founded in 1842. Beginning in the 1860s, MBC provided a program of study for women patterned on the curriculum of mathematics, classics, and science then offered only to men at the University of Virginia. In recent decades, MBC has responded to the changing role of women in society by expanding its curriculum "to include the new options open to women in business and the professions." Pet. App. 122a. Accordingly, MBC has "developed an emphasis on career planning," has "computerized the campus," and has added "new facilities for the communications and computer science disciplines" and "new state of the art equipment for its science labs." *Id.* at 122a-123a. In short, MBC "is committed to the education of women for a world of expanding opportunity." *Id.* at 122a.

MBC has over 1300 students, approximately 700 of whom are residential undergraduate students. MBC has a Phi Beta Kappa chapter, is accredited by the Southern Association of Colleges and Schools, and has repeatedly been ranked among the top ten liberal arts colleges in the Southeast. MBC's 55-acre campus in Staunton, Virginia, includes the facilities of the former Staunton Military Academy, residence halls, classroom buildings, computer and science laboratories, a 40,000-square-foot physical education facility, playing fields, tennis courts, and a swimming pool. Pet. App. 123a, 125a-129a.

The student-faculty ratio in MBC's residential program is eleven to one. MBC offers 28 undergraduate majors, including degrees in mathematics, sciences, business, and the arts. MBC also offers pre-law and pre-med programs, as well as joint-degree engineering programs with Washington University and with the University of Virginia. Pet. App. 123a-124a; App., *infra*, 17a, 19a-23a. MBC is "geared in the direction of trying to encourage women to persist in math and physics." *Id.* at 126a.

MBC enjoys "a record of success in developing new programs and operating distinctive and unique programs within the larger traditional undergraduate residential community." Pet. App. 125a. For example, MBC has successfully established a unique residential educational program for academically gifted, high-school-age female students. The program is tailored to "the academic, emotional and developmental needs of young women." *Id.* at 126a.

2. Virginia Military Institute

VMI, which was founded in 1839, has an enrollment of about 1300 students. It employs a unique "adversative" system for developing character and leadership in young men. The adversative method is intended to create doubts about students' previous beliefs and experiences and thereby prepare them to accept the values and behavior taught by VMI. Pet. App. 175a n.10, 189a, 191a-192.

"Physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values are the salient attributes of the VMI educational experience." Pet. App. 191a-192a. First-year VMI students are subjected to an extreme form of the adversative model known as the "rat line," which "is comparable to Marine Corps boot camp in terms of both the physical rigor and mental stress of the experience." *Id.* at 194a-195a.

Students at VMI live in a four-story barracks housing one class per floor. "There is a total lack of privacy" in the barracks: there are no door locks or window shades, and the doors to the students' rooms contain open windows that permit "the officer in charge to . . . see every cadet without anything being hidden." Pet. App. 198a-199a. The barracks features group bathrooms[2] and "close and intimate

[2]There is one bathroom on each floor, serving up to 400 students. Each bathroom has group showers with about 24

[Footnote continued on next page]

quarters." *Id.* In short, "there is literally no place in the barracks that physically affords privacy," and students are thus "under constant scrutiny." *Id.* at 198a, 199a. This total lack of privacy and constant scrutiny is an integral part of the VMI experience. *Id.* at 199a.

Also of crucial importance to the VMI method is its strict egalitarianism. "The VMI experience is based on absolute equality, which is achieved through treating everyone in exactly the same way." Pet. App. 237a. The spartan and public nature of life in the barracks "is an aspect of the egalitarian ethic at VMI," as is the fact that VMI imposes the same physical requirements on all students, regardless of ability. *Id.* at 198a, 233a.

Each VMI student must participate in an ROTC program like those offered at other undergraduate institutions. Unlike the federal military academies, which exist to prepare their graduates for career service in the armed forces, VMI's military emphasis is primarily a teaching device; only 15 percent of VMI graduates choose military careers. Pet. App. 116a-117a, 200a, 206a, 218a-219a.

B. Initial Proceedings Below

1. The District Court's Liability Decision

The United States brought suit against respondents in 1990, seeking admission of women to VMI. After a six-day trial, the district court found for respondents under the standard enunciated in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), which asks whether a challenged gender-based classification "'serves important gov-

[Footnote continued from previous page]

heads, and there are no doors on the partitions separating each toilet. Pet. App. 128a, 240a.

ernmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives.'" Pet. App. 165a.

Based on the unrebutted expert testimony and academic studies in the record, the court found that a "substantial body of 'exceedingly persuasive' evidence supports VMI's contention that some students, both male and female, benefit from attending a single-sex college." Pet. App. 168a; *see id.* at 167a-170a, 174a, 176a, 225a-227a. The court further found that VMI's adversative method is beneficial to adolescent males, but ill-suited to most adolescent females. Pet. App. 171a-172a, 223a-225a.[3]

These findings were based, not on stereotypes or preconceived notions, but rather on the informed judgments and testimony of leading professional educators and social scientists. As the court explained, a "substantial body of contemporary scholarship and research supports the proposition that, although males and females have significant areas of developmental overlap, they also have differing developmental needs that are deep-seated," and thus that "there are important differences between men and women in learning and developmental needs." Pet. App. 223a-224a. Moreover, the court expressly found that "[these] psychological and sociological differences between men and women are real differences, not stereotypes." *Id.* at 225a.[4]

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[3]These findings, of course, refer to the developmental characteristics of college-age male and female students, and reflect the sensitive and sometimes difficult nature of the transition from late adolescence to adulthood that such students are experiencing. The district court made no such findings with respect to students at the graduate or post-graduate educational levels.

[4]Even petitioner's education expert conceded this point, agreeing that "there clearly are differences between men and women, and not only obvious physiological ones, but ones

[Footnote continued on next page]

The district court also found that "key elements of the adversative VMI educational system . . . would be fundamentally altered, and the distinctive ends of the system would be thwarted, if VMI were . . . to make changes necessary to accommodate [the] needs and interests" of female students. Pet. App. 167a. Substantial changes would inevitably be required to crucial aspects of VMI's educational method, including the rigorous physical training program[5] and the constant scrutiny and total lack of privacy in the barracks.[6] And the belief that these changes would occur "is well-founded in empirical evidence, and not based on stereotype." *Id.* at 171a.

These changes would necessarily lead to differential treatment of distinct groups of VMI students on the basis of gender, thereby contradicting VMI's core principle of absolute equality of treatment.[7] Moreover, coeducation "would

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having to do in part with how they interact, how they learn and so on." 91-1690 C.A. Br. 24; 91-1690 C.A. App. 625.

[5]*See* Pet. App. 233a ("If women were admitted to VMI, it would be necessary to change certain physical training program courses and to set different standards. . . . Either [some aspects] would have to be abandoned, or there would have to be accommodations that would result in a dual track for women."); *id.* at 234a ("If VMI were coeducational and females were subjected to the same physical demands as male cadets, females would suffer on the order of 300% more injuries than males."); *id.* at 221a.

[6]Pet. App. 233a ("Adaptations would have to made in order to provide for individual privacy, for the sake of the men as well as for the sake of the women. . . . The introduction of privacy required by admission of women at VMI would contradict the principle that everyone is constantly subject to scrutiny by everyone else.").

[7]Pet. App. 237a ("The VMI experience is based on absolute

[Footnote continued on next page]

produce cross-sex relationships among cadets that would significantly alter the character-building and leadership-development aspects of the VMI experience." Pet. App. 239a. As a result, "it would be impossible for a female to participate in the 'VMI experience,'" because "her introduction into the process would change it. Thus, the very experience she sought would no longer be available." *Id.* at 175a; *see also id.* at 176a, 227a.

The district court therefore concluded that VMI's admissions policy was constitutional under *Hogan*, because it was substantially related to the important state objectives of increasing educational diversity and providing the "substantial educational benefits" of single-sex education and the VMI method. Pet. App. 173a, 176a-177a.

2. The Court of Appeals' Liability Decision

The court of appeals affirmed the district court's findings of fact but vacated and remanded for further proceedings. In particular, the court of appeals upheld the district court's findings that "VMI's unique methodology justifies a single-sex policy" and that "the record supports the conclusion that single-sex education is pedagogically justifiable, and VMI's system . . . even more so." *Id.* at 151a; *see id.* at 137a, 150a, 155a.

The court also affirmed the district court's findings "that VMI's mission can be accomplished only in a single-gender

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equality, which is achieved through treating everyone in exactly the same way. . . . Given the actual physiological, psychological, and sociological differences between males and females, it would be impossible to treat everyone fairly by continuing to treat them the same if women were admitted to VMI. Equal treatment would necessarily give way to fair treatment, thus undermining egalitarianism.").

environment and that changes necessary to accommodate coeducation would tear at the fabric of VMI's unique methodology." Pet. App. 148a. Admission of women would require creation of "a dual track physical training program" which would in turn lead to perceptions of unequal treatment, jealousy, and resentment. *Id.* at 146a-147a. The total lack of privacy engendered by the barracks system would no longer be possible. *Id.* at 147a. And the VMI system would be unable to accommodate the cross-sex confrontation and harassment that would necessarily occur if VMI attempted to maintain its adversative method in a coeducational setting. *Id.*[8]

Accordingly, the court of appeals concluded that the admission of women to VMI "would deny those women the very opportunity they sought because the unique characteristics of VMI's program would be destroyed by coeducation." Pet. App. 148a. Nonetheless, the court held that the Commonwealth had failed to justify its policy of providing single-sex education only to men. *Id.* at 151a-154a. The court remanded the case to permit the Commonwealth to formulate an acceptable remedy such as "establish[ing] parallel institutions or parallel programs." *Id.* at 156a.

3. VMI's Petition for a Writ of Certiorari

VMI filed a petition for a writ of certiorari seeking review of the court of appeals' liability determination. *VMI v. United States*, No. 92-1213. Petitioner filed a brief in opposition, asserting that certiorari was not warranted because of the fact-bound nature of the court of appeals'

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[8]Importantly, the court of appeals expressly rejected petitioner's claim that this finding was based on stereotyping: "the evidence supported the district court's finding that cross-sexual confrontation and interaction introduces additional elements of stress and distraction which are not accommodated by VMI's methodology." Pet. App. 147a.

decision and because this case involves only the constitutionality of VMI's "unique" educational program and therefore does not present important or recurring legal issues. 92-1213 Br. in Opp. 9-20. This Court denied certiorari. 113 S. Ct. 2431 (1993).

C. Proceedings on Remand

1. Virginia Women's Institute for Leadership

Believing that its educational goals would best be served by continuing to provide the option of single-sex education, the Commonwealth chose to extend that option to women through creation at MBC of a state-supported program known as the Virginia Women's Institute for Leadership (VWIL). VWIL will provide single-sex undergraduate education with military training in an integrated program designed "to produce the 'citizen soldier,' *i.e.*, women who are trained for leadership in both civilian and military life." Pet. App. 63a.

In 1993, MBC formed a task force of professionals in the field of single-sex education to plan and implement VWIL. The task force "made an in-depth study of the published literature on the developmental psychology of women and the cognitive development of women" and "consulted outside experts" in addition to drawing on its own collecive experience in women's education. Pet. App. 63a, 103a. After conducting "a detailed study of the approriate methods by which the leadership program should be strucured," including an examination of "the VMI methodology and outcomes" (*id.* at 63a, 104a), the task force concluded that VMI's adversative method "would be wholly inapprorite for educating and training most women for leadership roles." *Id.* at 63a.[9]

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[9]Petitioner has sought to discredit these conclusions by labeling them "stereotypes." The factual findings below are to the

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Accordingly, the task force developed a program that is specifically designed to develop women leaders through use of a "method which reinforces self-esteem rather than the leveling process used by VMI." Pet. App. 64a. Like VMI, VWIL offers an integrated and "highly structured program" that combines "the co-curricular and the curricular to promote the student's development in all phases of her life" and that pursues "the same five goals as those pursued at VMI: education, military training, mental and physical discipline, character development, and leadership development." *Id.* at 8a, 63a, 103a-104a. More than 40 young women have now accepted admission to VWIL's entering class and paid nonrefundable deposits. App., *infra*, 16a.

As part of the VWIL program, students must demonstrate computer and foreign language proficiency and complete courses in calculus, statistics, and laboratory sciences. In addition, they must complete an extensive leadership development curriculum, a leadership externship, leadership laboratory activities, two Leadership Speaker Series, and community service projects. *Id.* at 9a, 64a-65a, 108a-109a.[10] No male students will attend classes with VWIL

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contrary, however, and petitioner's unsupported characterizations ignore the fact that the task force was composed largely of women whose profession it is to educate female students for leadership roles in society. C.A. App. 269. These individuals have spent their professional lives in this field and would be the very first to detect and reject harmful stereotypes about female college students.

[10]Petitioner complains (Pet. 9-10 & n.7, 18) that VWIL students cannot obtain a bachelor of science degree or a state-financed engineering degree. In fact, however, VWIL students can choose from a variety of science and mathematics majors

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students. *Id.* at 65a.

Women enrolled in VWIL are also required to complete four years of an ROTC program through cross-enrollment agreements between MBC and the ROTC units at VMI.[11] These ROTC programs will utilize the uniform ROTC curriculum and methods including standardized military physical training and evaluation activities, and will provide the same leadership training and military career opportunities as all other ROTC programs. Pet. App. 67a, 109a, 116a-117a; App., *infra*, 12a-13a. VWIL students will also constitute a corps of cadets with military rank, will wear uniforms, will drill in ROTC, and will participate in the Virginia Corps of Cadets, which consists of all VMI and VWIL cadets together with the coeducational Virginia Polytechnic Institute and State University (VPI) Corps. *Id.* at 110a.[12]

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offered at MBC (Pet. App. 123a), and will have an opportunity to obtain a state-supported degree in engineering through a newly established dual degree program with the University of Virginia. App., *infra*, 17a, 19a-23a. The district court found that there would be only "a very slight demand for an engineering program at an all female VWIL." Pet. App. 65a.

[11]The military's ROTC programs do not utilize adversative training methods, and it is not necessary for students to be exposed to those methods or to the other aspects of the VMI program in order to succeed in ROTC and the military. Pet. App. 67a, 118a.

[12]VPI's Corps of Cadets has a mission similar to that of VMI and VWIL, but seeks to achieve the same results in the setting of a large coeducational university, thereby enhancing the diversity of the Commonwealth's educational offerings. The VPI Corps is a residential ROTC unit with about 400 male and female students. VPI cadets who are single must live in the Corps residence hall, and all cadets wear uniforms and adhere

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In addition to their ROTC physical training and drill, VWIL students will be required to complete eight semesters of physical and health education, including self-defense and an advanced fitness course designed for VWIL students. Pet. App. 111a. VWIL students will also receive special "training in self-defense and self-assertiveness" as part of a program "designed to be analogous to the VMI 'rat challenge'" and consisting of a variety of "physically and mentally challenging events." *Id.* at 112a. In sum, VWIL's physical training program "is designed to be comparable in rigor and challenge to the physical training test for men at VMI." *Id.*

Before the start of their freshman year, VWIL students will participate in a special "cadre week orientation" to be run by upperclass VWIL students and designed to provide "a physically and mentally demanding experience which will foster bonding and which will be a paradigm for VWIL itself." Pet. App. 110a, 114a. Freshmen VWIL students will room together in freshman residence halls and will be subject to a variety of regulations, including spot inspections and a required study hall. "[T]he VWIL program will use the highly disciplined schedule of the VMI model." *Id.* at 66a-67a, 114a.

After their freshman year, VWIL students will be required to live for at least one year in the VWIL House, which will be the center for VWIL meetings and activities. Pet. App. 115a. Upperclass VWIL students will serve as mentors for incoming VWIL students and will play an important role in orienting incoming students, enforcing rules and regulations, teaching VWIL standards and expec-

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to military-type regulations and discipline. Pet. App. 214a-218a.

tations, organizing and directing drills, and leading the VWIL Corps. *Id.* at 115a-116a. VWIL students will be subject to MBC's honor code system. *Id.* at 114a-115a.

Both the Commonwealth and VMI have provided extensive financial and other support for the development and implementation of VWIL, and they and MBC are committed to the program's success. Pet. App. 68a, 81a-83a, 102a-106a. The Commonwealth has expressed "unambiguous and unequivocal support of single-sex education for men and women," and all relevant Virginia officials "have strongly supported VWIL." *Id.* at 81a, 83a.[13] The Virginia General Assembly has enacted legislation mandating equal funding (on a per-student basis) for VWIL and VMI without any limit on the maximum number of VWIL students. *Id.* at 10a, 80a & nn. 18-19; App., *infra*, 12a.

VMI has cooperated extensively in the development of VWIL, and "has committed to support the VWIL program." Pet. App. 102a, 105a. VMI and MBC have jointly formed a leadership education advisory board that will study "the advancement of leadership training at VMI and MBC" and will monitor the outcomes of the two programs. *Id.* at 105a; App., *infra*, 6a, 14a; *see also id.* at 17a, 24a-26a. The VMI Foundation has provided substantial financial support for the implementation of VWIL and is committed to providing VWIL with an additional $5.5 million endowment once final court approval has been obtained. Pet. App. 120a; App., *infra*, 6a-7a, 12a.

VMI is also committed to providing VWIL with full access to and support from its alumni network. VMI alum-

[13]Petitioner notes (Pet. 4 n.2) that former Governor Wilder expressed personal opposition to the exclusion of students from public educational institutions on the basis of gender, but Governor Wilder subsequently submitted an affidavit in support of VWIL, stating that it "will remedy all current discrimination." Pet. App. 81a n.20.

ni and admissions personnel assist in recruiting applicants for VWIL. Pet. App. 120a-121a; App., *infra*, 3a, 5a, 10a, 14a. The VMI Alumni Association has extended its placement services and networks to VWIL, will assist VWIL students in obtaining leadership externships, and has begun to develop joint alumni networking opportunities with MBC. Pet. App. 121a; App., *infra*, 6a. In short, "[t]he attitude of VMI alumni toward VWIL is extremely supportive. They are committed to making VWIL work." Pet. App. 121a.

2. The District Court's Remedial Decision

After conducting a six-day trial and considering the testimony of 18 expert witnesses (Pet. App. 87a-98a), the district court found that the Commonwealth had satisfied the requirements of the Equal Protection Clause by offering VWIL as a single-sex leadership education program for women. Rejecting petitioner's argument that the Commonwealth was required to provide a mirror-image VMI for women, the court expressly found that "VWIL is a good design for producing female citizen-soldiers" and that "the differences between VWIL and VMI are justified pedagogically and are not based on stereotyping." *Id.* at 67a, 76a.[14]

[14]This finding is supported not only by evidence introduced by respondents but also by statements of petitioner's witnesses. For example, according to petitioner's expert Dr. Alexander Astin, "[s]ome of the largest gender differences occur in the area of psychological well-being: the declines in psychological well-being (feeling depressed, feeling overwhelmed, low self-rating on emotional health) are all stronger among women than among men during the undergraduate years." C.A. App. 278. *See also* Pet. App. 225a (noting that petitioners' witness Colonel Patrick Toffler, Director of the Office of Institutional Research at West Point, conceded that "[t]he psychological and sociological differences between men and women are real differences, not stereotypes").

In support of these findings, the court relied on expert testimony that "the VWIL approach towards educating and preparing women leaders was preferable to the VMI approach" and indeed that "the demand for an all-women's VMI would be so small as to make the project unfeasible," whereas "there would be much more significant demand for VWIL." *Id.* at 73a, 75a & n.12.

Indeed, as the court noted, Dr. Elizabeth Fox-Genovese, "one of the leading experts on the educating of women," testified that "an adversative method of teaching in an all-female school would be not only inappropriate for most women, but counter-productive," because it would be destructive of women's self-confidence. Pet. App. 64a, 74a. Petitioner offered *no* experts in single-sex education, leaving this testimony effectively unrebutted. Moreover, the court expressly rejected the testimony of Dr. Carol Jacklin, petitioner's expert in psychology, who asserted that the differences in methodology at VMI and VWIL were based on stereotypes. *Id.* at 72a-73a. The court explained that Dr. Jacklin's "testimony was contradicted by most of the evidence in the record," including her own admissions that women students tend to be less aggressive in the classroom and would "have more chances for leadership at single-sex institutions." *Id.*

The district court also found that VWIL was likely to attain its goal of producing "citizen-soldiers" well prepared for leadership roles in civilian and military life. Pet. App. 83a. Based on the experts' conclusions that "the methods adopted for the VWIL will produce the same or similar outcome for women that VMI produces for men" (*id.* at 64a) and that "VWIL will produce the kind of self-assurance in the face of accomplishment of difficulties that VMI offers and requires of its cadets" (*id.* at 75a-76a), the district court rejected petitioner's argument that VWIL must mirror VMI. Instead, the court held that VWIL satisfied the Commonwealth's constitutional obligations because it

"will achieve substantially similar outcomes in an all-female environment and . . . there is a legitimate pedagogical basis for the different means employed to achieve the substantially similar ends." *Id.* at 76a.

3. The Court of Appeals' Remedial Decision

The court of appeals affirmed and remanded for further proceedings. The court made clear at the outset that, in addition to the two-pronged test applied by this Court in *Hogan*, it was requiring the Commonwealth to satisfy a third requirement, which entails "carefully weighing the alternatives available to members of each gender denied benefits by the classification" in order to determine whether those alternatives are "substantively comparable." Pet. App. 17a.

Turning to the first prong of the *Hogan* test, the court reaffirmed the factual finding that "single-gender education at the college level is beneficial to both sexes," and concluded that "a state's opting for single-gender education as one particular pedagogical technique among many" is "a legitimate and important governmental objective." Pet. App. 20a, 21a. The court next concluded that the Commonwealth's decision to provide single-sex education through VMI and VWIL was directly related to the Commonwealth's legitimate and important objectives, because "the only way to realize the benefits of homogeneity of gender is to limit admission to one gender." *Id.* at 22a. In addition, the court found that "[t]he classification for single-gender education at VMI is also directly related to achieving the results of an adversative method in a military environment," because essential "'characteristics of VMI's program would be destroyed by coeducation.'" *Id.* at 6a-7a, 23a.

Finally, the court concluded that the benefits offered by VMI and VWIL were "substantively comparable." Pet. App. 24a-28a. After scrutinizing the two programs, the

court found that "the mission and goals are the same, and the methodologies for attaining the goals, while different, nevertheless are reasonably calculated to succeed at each institution." *Id.* at 27a. Moreover, the differences in the two programs are justified because they are "attributable to a professional judgment of how best to provide the same opportunity." *Id.* at 26a.

Indeed, as the court explained, providing women with a program identical to VMI would not be practicable, because "[e]ducational experts for the Commonwealth testified that women may not respond similarly" to an adversative approach and that a women's program identical to VMI "would attract an insufficient number of participants to make the program work." Pet. App. 27a. Accordingly, the court of appeals upheld the remedy approved by the district court. In order to ensure the effective and successful implementation of VWIL, the court remanded the case to the district court with instructions to oversee the remedy. Pet. App. 30a.

REASONS FOR DENYING THE WRIT

The petition meets none of this Court's criteria for the exercise of its certiorari jurisdiction. In the first place, the petition is limited to remedial issues, but threshold questions about the correctness of the court of appeals' liability determination would likely preclude the Court from reaching those issues in this case.[15] Moreover, as set forth

[15]Respondents have filed a conditional cross-petition challenging the court of appeals' liability determination. *See Virginia v. United States*, No. 94-___. Regardless of the disposition of that cross-petition, however, the threshold question of liability will arise in this case if the Solicitor General's petition is granted, because a judgment may be defended on any ground supported by the record. *Schweiker v. Hogan*, 457 U.S. 569, 585 n.24 (1982); *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977). Of course, respondents fully

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below, there is no conflict among the circuits, nor (despite petitioner's contentions to the contrary) is there any inconsistency between the decisions of this Court and the decision below. Indeed, petitioner's challenge to the court of appeals' ruling rests fundamentally on petitioner's rejection of explicit factual determinations rather than on any legal question of substantial or recurring importance. Petitioner simply disagrees with the factual findings by both courts below that the differences between the VMI and VWIL programs reflect pedagogically justified responses to non-stereotypical differences between male and female college students. That fact-bound disagreement is not worthy of review, and the petition should therefore be denied.

A. The Judgment Below Does Not Conflict With Any Decisions Of This Court Or Of Any Other Appellate Court

As petitioner implicitly concedes, there is no circuit conflict on the questions raised in the petition. Indeed, the decision below is consistent with the only lower court opinions (and judgments of this Court) addressing the constitutionality of dual single-sex educational programs. *Compare Vorchheimer v. School Dist.*, 532 F.2d 880, 882, 887-88 (3d Cir. 1976) (upholding separate boys' and girls' high schools because they were "comparable" but not identical), *aff'd by equally divided Court*, 430 U.S. 703 (1977), and *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970)

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support the VWIL program and accept the remedial ruling below, but the absence of a proper basis for the court of appeals' liability determination will provide an alternative (and logically prior) ground for affirmance in the event of review by this Court.

(upholding separate public "school for young ladies" where State also supported a single-sex "military school" for men), *aff'd*, 401 U.S. 951 (1971), *with* Pet. App. 25a, 28a (State must "affor[d] to both genders benefits comparable in substance, but not in form and detail").

Petitioner instead asserts that certiorari is warranted because of purported conflicts between this Court's precedents and the decision below. These purported conflicts do not exist, however, and further review is therefore not warranted.

1. *Sweatt v. Painter* is Inapposite

Petitioner errs in contending (Pet. 16, 18) that the decision below "conflicts with" *Sweatt v. Painter*, 339 U.S. 629 (1950). *Sweatt* involved a *racial* classification, not a gender-based classification, and this Court has never applied (or even cited) *Sweatt* in a case involving the latter issue.[16] Petitioner cites this Court's decision in *Hogan* for the proposition that the "separate but equal" test applied in *Sweatt* is also applicable here (Pet. 17, citing 458 U.S. at 720 n.1), but the cited footnote instead reveals that the *Hogan* Court did not address that issue, which was not presented on the facts of that case.

Moreover, even petitioner is apparently unwilling to take

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[16]Indeed, in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), a case involving racial classifications in education, Justice Powell's controlling opinion relied in part on *Sweatt* (*see id.* at 287, 313-14) but expressly rejected the relevance of the legal standards applied in cases involving gender-based classifications, noting that "the Court has never viewed [gender-based] classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis." 438 U.S. at 303; *accord Vorchheimer*, 532 F.2d at 886 (holding that *Sweatt* is "inapplicable" in analyzing constitutionality of dual single-sex schools).

the position that the Court's analysis in *Sweatt* is applicable without modification in the context of single-sex schools. Instead, petitioner suggests (Pet. 16) that differential treatment of the genders is permitted if the State "justif[ies] any inequality under a standard of heightened constitutional scrutiny." But that is not the test set forth in *Sweatt*, and the fact that petitioner feels compelled to rewrite *Sweatt* before attempting to extend it to gender-based classifications is simply further evidence of the inapplicability of that decision in this context. And in any event, the findings below demonstrate that VMI and VWIL would satisfy the hybrid test proposed by petitioner, so there is no possibility of a conflict. *See* Pet. App. 76a ("there is a legitimate pedagogical basis for the different means employed [by VMI and VWIL] to achieve the substantially similar ends"); *id.* at 26a, 27a.

2. The Alleged Conflict Asserted by Petitioner Reflects Nothing More Than Disagreement With the Facts Found Below

Petitioner also asserts (Pet. 16, 19) that the decision below conflicts with *Hogan*, *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), and similar cases involving the constitutionality of gender-based classifications. According to petitioner, this purported conflict arises because the court of appeals did not apply the test enunciated in those cases, which asks whether "the difference in treatment serves important governmental objectives and is substantially related to the achievement of those objectives." Pet. 19.

Petitioner's attempt to manufacture a conflict with this Court's gender-discrimination precedents rests upon a misreading of the decisions below. Both courts below expressly acknowledged and applied the precise legal standard

quoted by petitioner. *See* Pet. App. 13a, 145a, 165a.[17] Petitioner disagrees with the conclusion reached by the lower courts in applying that standard to the facts of this case, but that fact-bound disagreement hardly justifies the exercise of this Court's certiorari jurisdiction.

Indeed, a careful reading of the petition demonstrates that petitioner's real objection to the decision below is aimed at the factual underpinnings of that decision, not the legal standard applied by the court of appeals. Petitioner's principal and often-repeated claim is that the court of appeals allegedly based its ruling on "stereotypes" and "archaic notions" about women and their proper role in society. *See, e.g.*, Pet. 15, 19-24. That assertion, however, is directly contrary to the factual findings below, and the issues raised in the petition effectively disappear once those findings--rather than petitioner's characterizations--are examined.

As the district court found, modern scholarship and research demonstrates that "there are important differences between men and women in learning and developmental needs," and these "psychological and sociological differences are real differences, not stereotypes." Pet. App. 224a, 225a. Moreover, the court found that VWIL was carefully designed to achieve the same results as VMI by taking account of these differences in its student body, and thus "the differences between VWIL and VMI are justified pedagogically and are not based on stereotyping." *Id.* at 76a.[18] The court of appeals agreed, explaining that "the

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[17]As noted above, the court of appeals went beyond *Hogan*'s two-pronged test by creating a *third* prong that also had to be satisfied by the Commonwealth, but petitioner obviously does not and cannot contend that the creation of this additional requirement (which did not affect the result below and merely imposed an unduly high burden on respondents) provides a basis for review.

[18]Indeed, even petitioner's expert witnesses did not assert that

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difference [between VWIL and VMI] is attributable to a professional judgment of how best to provide the same opportunity." *Id.* at 26a.

These findings demonstrate conclusively that this case is wholly unlike *Hogan*, *J.E.B.*, or the other cases cited by petitioner (Pet. 19-21 & n.17). Rather than relying on outdated stereotypes or unfounded presumptions about the respective roles of the genders, the courts below considered the most up-to-date sociological, psychological, and physiological research and expert opinion and found, based on a "reasoned analysis" of the evidence, that real differences between adolescent men and women and between the optimum methods of educating them justify the methodological differences between VWIL and VMI. Neither the Constitution nor this Court's cases require more.[19]

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the VWIL program would be inappropriate or ineffective for women. Pet. App. 68a, 76a. Petitioner's expert on curricular and co-curricular offerings admitted that neither VMI's program nor VWIL's program was "better than the other." *Id.* at 69a n.5, 96a. Petitioner's contention in this Court that VWIL reflects harmful stereotypes and prejudicial views of women is thus contrary to the record and findings below.

[19]Petitioner contends (Pet. 22) that the Constitution forbids educators to take account of demonstrable differences in the educational needs of male and female adolescents because such differences "may well reflect the effects of long-standing sex-based limitations on social roles." Petitioner offers no support for this *ipse dixit*, however, and whatever its validity, it would hardly follow that educators must ignore these real differences in formulating education programs. Instead, the approach most in keeping with the Constitution's mandate of equal opportunity would be for educators to develop programs that are designed to *eliminate* any lingering effects of past societal stereotyping by developing self-confident graduates who are well-equipped to seek and obtain positions in all facets of

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In short, the factual findings by the courts below are fatal to petitioner's attempt to create an inconsistency between the judgment below and the decisions of this Court. Petitioner's quarrel is with the record, not the law, but this Court does not sit to review facts found by two lower federal courts. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States v. Doe*, 465 U.S. 605, 614 (1984).[20] The purported "conflict" identified by petitioner

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American society, regardless of archaic notions about which gender is better suited to a particular job. The findings and expert evidence in the record demonstrate that single-sex education tends to *reduce* the effects of societal stereotyping on both men and women by making students "more likely to take the risk of choosing a career normally associated with the other sex," Pet. App. 226a, and that VWIL will be *more* effective than a mirror-image VMI at preparing most women students to assume leadership roles in modern society. *Id.* at 27a, 63a-64a, 73a-74a.

[20]Petitioner's cavalier treatment of the facts is also apparent from its argument (Pet. 20, 21) that exclusion of women from VMI perpetuates an "archaic, exclusive association of each gender with particular professions--here the premise that men, and not women, are fit to be military leaders." Exclusion from VMI sends no message of unfitness for a military career, because (with the exception of the service academies) *all* undergraduate institutions--including VMI, VWIL, and the coeducational University of Virginia and VPI--produce military leaders in precisely the same way: through standardized ROTC programs that are the same across the Nation. The district court specifically found that (1) "nothing about the ROTC programs at VMI is unique to VMI other than the absence of women," (2) non-VMI students perform marginally *better* than VMI students in their ROTC programs, and (3) VWIL's ROTC programs will offer "the opportunity to be commissioned in the armed services." Pet. App. 116a-117a, 119a. Thus, women enrolled at VWIL have at least as good

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simply does not warrant review.

3. No Decision of this Court Supports the Contention that Admission of Women to VMI is the Only Acceptable Remedy

Petitioner also errs in contending (Pet. 23-26) that the decision below conflicts with precedents of this Court holding that "overbroad . . . generalizations" cannot be used to justify "sex-based classifications that are applied to foreclose individual opportunity." In the first place, as already noted, the differences between VMI and VWIL are not based on "'archaic'" and "'outdated'" assumptions or "'stereotypical'" notions containing at most a "'shred of truth'" (Pet. 24 & n.20), but are instead predicated on the expert knowledge, advice, and research of highly regarded professional educators and social scientists. The cases cited by petitioner are therefore inapposite.

Second, the cases on which petitioner relies involved gender-based classifications that were overbroad in that they excluded all members of the disfavored class even though the governmental justification for the classification was not applicable to many of the excluded individuals and thus was not served by their exclusion. In this case, by contrast, the gender-based classification is not overbroad. Rather, it is directly and precisely tailored to the Commonwealth's legitimate and substantial interest in providing a diverse educational system that offers the unique benefits of a single-sex college education, and those benefits simply cannot be achieved without a gender-based admissions policy.

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an opportunity to become military leaders as they would if they were enrolled at VMI, and there is no basis for petitioner's assertions to the contrary.

Third, petitioner is simply wrong in suggesting that a classification is invalid if there are any members of one gender as to whom the classification is not accurate. This Court has never held that there must be a paradigmatically perfect fit between a gender-based classification and the interests served by it, and petitioner points to no authority to the contrary. Instead, petitioner cites cases holding that a gender-based classification must be "substantially related" to the achievement of the underlying objective.[21] As this Court made clear in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990),[22] however, a classification need not be accurate "in every case" in order to survive intermediate scrutiny. Rather, as long as the empirical evidence suggests that the classification will, "in the aggregate," advance the underlying objective, the classification will be upheld as the "product of 'analysis' rather than a 'stereotyped reaction' based on '[h]abit.'" 497 U.S. at 579, 582-83.[23] That approach is particularly appropriate in the con-

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[21]Petitioner also cites (Pet. 24 n.20, 25 n.21) Justice Brennan's plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973). That opinion, however, applied "strict judicial scrutiny" to a gender-based classification. *Id.* at 688. That approach has never been adopted by the full Court, and petitioner has not asked the Court to revisit that issue (which was, in any event, neither pressed nor passed upon below). Petitioner's reliance on the *Frontiero* plurality is therefore inappropriate.

[22]In *Adarand Constructors, Inc. v. Pena*, No. 93-1841 (U.S. June 12, 1995), slip op. 26, this Court overruled *Metro Broadcasting*'s holding that certain federally mandated race-based classifications are subject only to intermediate scrutiny. The *Adarand* Court did not suggest that *Metro Broadcasting* represented an inaccurate illustration of the intermediate-scrutiny standard, however, and thus *Metro Broadcasting* continues to provide guidance on that issue.

[23]*Accord Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)

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text of higher education, because educational programs must of necessity be designed to accommodate group characteristics and preferences rather than the desires of individual students.

Finally, petitioner's argument in this regard, as well as its requested remedy (Pet. 26-29), rests on the false assumption that those few women who might be interested in experiencing the unique elements of a VMI-type education could do so if a different remedial approach were mandated by the courts. That assumption is belied by the record and findings below, which demonstrate conclusively that it

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[Footnote continued from previous page]

(rejecting argument that separate classification of male and female Navy officers was based on impermissible "archaic and overbroad generalizations" where facts demonstrated that women "will not *generally* have compiled records . . . comparable to those of male[s]") (emphasis added). Petitioner's argument that perfect tailoring is required rests on a misreading of the relevant precedents. For example, petitioner cites *Craig v. Boren*, 429 U.S. 190 (1976), in support of this argument (*see* Pet. 25 n.21), but the classification invalidated in *Craig* was almost absurdly imprecise. *See* 429 U.S. at 201-202, 203 n.16 ("if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit,'" and the alleged "statistical disparities between the sexes are not substantial"). Likewise, petitioner relies (Pet. 24-25) on *J.E.B.*, but most of the empirical evidence in that case refuted the existence of *any* correlation between gender and juror attitudes. 114 S. Ct. at 1426-27 & n.9. *See also Hogan*, 458 U.S. at 731 (record was "flatly inconsistent" with assertion that classification was related to proffered justification); *Frontiero*, 411 U.S. at 689 ("[t]he Government offer[ed] no concrete evidence . . . tending to support its view that" the challenged classification advanced the proffered governmental interest).

would be impossible to duplicate the VMI experience for women with the mathematical precision expected by petitioner.

In the first place, a separate women's program identical to VMI would be unworkable and financially impossible because too few women would be interested in participating in such a program. As the court of appeals noted, petitioner did not offer sufficient evidence to refute respondents' showing at trial that "if the state were to establish a women's VMI-type program, the program would attract an insufficient number of participants to make the program work." Pet. App. 27a; *see id.* at 73a, 75a & n.12.[24]

Likewise, as both courts below found, women cannot be admitted to VMI itself without destroying the very aspects of its program that serve to distinguish it from VPI, VWIL, and other institutions. Pet. App. 6a-7a, 24a-25a, 146a-148a, 170a-173a, 227a, 233a-234a, 237a-239a. The fundamental characteristics of VMI's educational method, including the adversative system, the total absence of privacy, and the strict egalitarianism that pervades all aspects of the program, would undergo radical change or disappear altogether with the admission of women, thus denying those women "the very opportunity they sought because the unique characteristics of VMI's program would be destroyed by coeducation." *Id.* at 6a-7a.

Petitioner disputes the accuracy of the latter finding, arguing (Pet. 27-29) that it is factually inaccurate and is

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[24]Based on West Point's experience in recruiting for its non-adversative, coeducational program, the district court concluded (Pet. App. 174a) that "some women" would want to attend a *coeducational* VMI (with the modified educational program entailed by coeducation). Petitioner offered *no* evidence of any significant interest in a mirror-image VMI for women, however, and thus it is undisputed that such a program would not be feasible.

improperly based on "sex-based generalizations." This challenge to the findings of both lower courts is not worthy of review, of course, and it is also incorrect. The evidence at trial--as distinct from the conclusory and baseless assertions of petitioner's counsel--demonstrates that VMI's adversative method would necessarily go the way of West Point's similar system if VMI were to become coeducational.[25] Indeed, the Marine Corps has been able to preserve the harsh regimen of its boot camps only by returning to a single-sex methodology (Pet. App. 235a), and petitioner points to no basis for concluding that VMI would have a different experience. In short, petitioner's characterizations of the facts of this case are simply false, and further review of these fact-bound issues is neither warranted nor appropriate.

B. The Questions Presented In The Petition Are Not Of Recurring Or Widespread Importance

For the reasons set forth above, the decision below does not conflict with any decisions of this Court or other appellate courts, and petitioner's disagreement with the court of appeals' ruling involves nothing more than case-specific

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[25]As the district court found, West Point modified and then abandoned the adversative model altogether after women were admitted, and it also rejected fixed physical training standards in favor of "comparable" training, thereby creating inequalities and resentment among the cadets. Pet. App. 235a-241a. Even petitioner made clear below that coeducation would require substantial changes in VMI's method, including the introduction of separate sports teams and dual-track physical education activities for women, the creation of privacy rights on the basis of gender, and the elimination of "harassment" deemed inappropriate for women. C.A. App. 99-103, 107-108. The result of these changes, of course, would be the complete demise of VMI's core ethos of equal treatment for all. Pet. App. 237a.

questions about the accuracy of the factual determinations made by the courts below. Nor does petitioner suggest that a decision on the merits in this case would have widespread impact or significance such that a grant of certiorari would be appropriate even absent any of the usual justifications for this Court's review. According to the petition, this case "does *not* require the Court to address the validity of public single-sex education generally." Pet. 16 n.13 (emphasis added). Instead, petitioner repeatedly emphasizes the purported *narrowness* of the questions presented, arguing that the judgment below is wrong because this case involves the "unique" educational methodology of a "unique" school. Pet. 15, 16 n.13. Indeed, petitioner even suggests (Pet. 27) that the remedy allegedly required here may be inapplicable in other cases involving single-sex schools, again because of the unique facts of this case.

Taking petitioner at its word, this case is simply not of sufficient general or recurring importance to merit review. Indeed, as petitioner explained in opposing review at an earlier stage of this case, further review is not warranted at this time because the rulings below rest on facts that "primarily involve VMI, an institution that petitione[r] [has] consistently described as 'unique.'" 92-1213 Br. in Opp. 19. "There is only one other all-male public college [in the Nation] besides VMI, and the fact that a challenge to its single-gender policy might raise issues similar to those of this case does not, standing alone, warrant further review." *Id.* at 19-20.

Petitioner's earlier objections to certiorari are at least equally applicable here. The Court previously denied certiorari in this case, and the petition identifies no persuasive reason for reaching a different result now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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June 23, 1995

APPENDIX

APPENDIX

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APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO. 90-0126-R
COMMONWEALTH OF VIRGINIA, et al.,	)	
Defendants.	)	

DEFENDANTS' FIRST STATUS REPORT

Pursuant to the Court's April 29, 1994 order approving Defendants' Proposed Remedial Plan ("Plan") and directing a status report of the progress of the Plan implementation every six months, Defendants, the Commonwealth of Virginia, et al. ("the Commonwealth") file this first status report.

Implementation Date. In accordance with the Court's order, the Virginia Women's Institute for Leadership ("VWIL") will commence with the 1995 fall semester. Orientation of entering students will begin on August 23,

1995. The first class of students is being recruited at the present time as described below.

The United States has appealed this Court's order approving the Plan to the United States Court of Appeals for the Fourth Circuit. The Court granted the motion of the Commonwealth to expedite the appeal in light of the ongoing recruiting of students. Oral argument was heard on September 28, 1994. No opinion has issued to date.

Contract for Services. The Plan provides for state funding of VWIL through a contract for services among the Commonwealth of Virginia, Virginia Military Institute ("VMI") and Mary Baldwin College ("MBC"). Plan at 13. On September 27, 1994, the Commonwealth of Virginia, acting by and through the State Council of higher Education for Virginia, approved the contract for services. A copy of the fully executed contract is attached as Exhibit 1.

VWIL Administration and Development. The VWIL Task Force rendered its final report to the MBC faculty on July 15, 1994. On September 9, 1994, the MBC faculty voted to approve the report, which constitutes final faculty approval of the VWIL curriculum. A copy of the report is attached as Exhibit 2. The Director of VWIL will develop the syllabi for the new leadership courses, described on p. 6 of Exhibit 2, subject to faculty review.

On July 12, 1994, President Tyson appointed Dr. Heather Wilson as acting Director of VWIL. Dr. Wilson also serves as the Dean of Students at MBC. Mr. Alan Duesterhaus was designated assistant to the acting Director of VWIL. Approximately 50% of their time has been devoted to the VWIL development since their respective appointments.

A Search Committee has been constituted to recruit a permanent Director of VWIL. A copy of advertisements in the Chronicle of Higher Education and Black Issues in Higher Education is attached as Exhibit 3. The Search Committee includes Dr. Wilson, Mr. Duesterhaus, mem-

bers of the MBC faculty, and a student representative. The Search Committee expects to fill the Director's position as of January 1, 1995. As of October 21, forty applications had been received. The Search Committee met on October 26 to establish criteria for reviewing applications and to begin the review process.

VWIL Recruiting. The staff of the MBC Admissions Office has been expanded by the addition of one recruiter whose primary responsibility is recruitment for VWIL. The position was filled as of July 15, 1994.

The Admissions Office developed a recruiting program after receiving proposals from a marketing firm. The VWIL recruiter has met with representatives of the VMI Admissions Office and the ROTC units at VMI to coordinate recruitment and referrals of female applicants. A recruiting budget of $96,000 for salary, recruiting material, and travel expenses has been allotted.

MBC recruiters are scheduled to visit approximately 500 high schools and, in addition, to attend more than 300 high school college fairs, between September 1994 and May 1995 to recruit for VWIL. High school military academies are included in the itinerary. The recruiting brochure and accompanying letter, attached as Exhibit 4, have been mailed to approximately 1300 high school students. Approximately 1000 of the recipients were identified by a student search for young women potentially interested in military and/or ROTC training. A VWIL view book is being developed and will be available for recruiting in November 1994. The VWIL recruiter is also sending a letter of introduction of herself and VWIL to all Virginia high school counselors.

A High School Visit Day was held at MBC on September 10, 1994 for high school girls and their parents. The afternoon session was devoted exclusively to VWIL. Of the 54 girls who participated, nine attended the VWIL

session. A second High School Visit Day in the same format is scheduled for November 12.

As of October 21, eighty-three inquiries regarding VWIL have been received from prospective students and parents of prospective students. The application form, which supplements the MBC application form, is attached as Exhibit 5 and became available on October 6, 1994. Applications will be accepted through April 15, 1995. As of October 21, one application had been received. Applicants who apply by February 15 will be notified by March 15. Applicants who apply by March 15 will be notified by April 15, and applicants who apply by April 15 will be notified by May 1.

ROTC. The acting Director of VWIL has met on several occasions with representatives of the ROTC programs conducted at VMI by the United States Army, the United States Navy/Marine Corps and the United States Air Force. On October 24, the acting Director of VWIL visited the United States Air Force ROTC unit at Maxwell Air Force Base. Cross-enrollment agreements have been developed between VMI and MBC, and are pending approval by the respective cadet commands.

VWIL Uniforms. The acting Director of VWIL is developing the uniform design with assistance from the uniform company that provides uniforms for the VMI Corps of Cadets.

Orientation Program Development. The acting Director of VWIL has developed the format for the orientation program for all new VWIL students, which will be conducted for one week before the commencement of the 1995 MBC fall session. VWIL women will participate in a four-day, physically rigorous, confidence-building wilderness experience in New Castle, Virginia, conducted by Wilderness Adventure, which is headed by a VMI graduate. The new members of the VWIL Corps will return to the

MBC campus for two days of VWIL orientation, including issuance of uniforms and drill practices.

Assessment Development. In spring 1994, MBC replicated most aspects of VMI's annual alumni survey in a survey of MBC alumnae to gather baseline data and to identify any methodological issues. Dr. Lewis Askegaard, Director of Institutional Research at MBC, has continued to consult with Colonel Steve RiCharde, his counterpart at VMI, to identify assessment instruments for the VMI cohort entering in the fall of 1995, the conditions of testing, and timing, all of which are to be replicated to the extent possible with the entering class of VWIL. They have also begun to explore some methodological issues, such as the comparative size of the two cohorts and the gender-specific differences in starting points on the various assessment instruments. Dr. Askegaard expects to operationalize the VWIL outcomes and specify assessment strategies for review by VMI and VWIL by the end of 1994.

Cooperation with VMI. Colonel Michael Bissell has been designated as liaison on behalf of VMI with VWIL. He has provided consultation on military training and the ROTC programs, assisted in the development of the VWIL uniform, and participated in the coordination of calendars between VMI and VWIL for activities such as field maneuvers.

The VMI Admissions Office is referring all female inquiries to the VWIL recruiter. At college fairs, young women are referred to the VWIL recruiter by VMI recruiters and alumni.

The ROTC officers at VMI have provided orientation or ROTC programs and scholarships to the VWIL recruiter, who has been invited to attend ROTC classes and field exercises.

The VMI Physical Education Department and the VMI Air Force ROTC are providing information and assistance to Sharon Spalding of the MBC Physical Education Depart-

ment, who is developing the VWIL physical fitness test and VWIL physical education program.

Colonel Steve RiCharde is continuing to consult with Dr. Lewis Askegaard in the development of a comparative assessment of VWIL and VMI.

Joint Advisory Board on Leadership Education. The Joint Advisory Board has been constituted and will hold its first meeting on November 4, 1994 at MBC. The membership of the Joint Advisory Board, the draft agenda and mission statement are set forth in Exhibit 6.

Joint Alumni Activities. The VMI and MBC Alumni Associations are planning joint alumni/alumnae activities. The Associations held a joint meeting in Mobile, Alabama on October 18, 1994.

Funding by the VMI Foundation. The September 25, 1993 Agreement ("Agreement") between the VMI Foundation ("Foundation") and MBC contemplated that VWIL would not admit students and the Foundation would not endow VWIL unless final court approval were obtained after all appeals had been exhausted. To provide funding for the commencement of VWIL in the 1995 fall semester notwithstanding that appeals may not have been exhausted, and to allow the continuation of funding to permit completion of the program by entering students in the event that final court approval is not ultimately obtained, the Foundation and MBC have entered into a First Amendment of the Agreement dated September 29, 1994 ("First Amendment"). A copy of the First Amendment is attached as Exhibit 7.

In accordance with the Agreement, the Foundation made payments to MBC before September 29, 1994, totaling $150,000, which have been expended on VWIL development to date. On September 29, 1994, the Foundation paid MBC $165,000 in accordance with paragraphs 1 and 9 of the First Amendment. The First Amendment also provides for a payment of $150,000 on or about January 1, 1995, to

fund the completion of the development of VWIL. The First Amendment further provides that the construction fund is immediately available, that the scholarship fund is available for students entering VWIL in the 1995 fall semester, and that a monthly payment of $22,760.42 (the income stream on the Permanent Endowment) shall begin on September 1, 1995 and continue until the transfer of the Permanent Endowment. The First Amendment also establishes the obligations of the Foundation and MBC in the event final court approval is not obtained after commencement of VWIL.

Pursuant to the Court's Order, Defendants will file a further Status Report within six months.

COMMONWEALTH OF VIRGINIA, GOVERNOR GEORGE F. ALLEN and THE STATE COUNCIL OF HIGHER EDUCATION

By:_____/s/_____

VIRGINIA MILITARY INSTITUTE, ITS BOARD OF VISITORS, SUPERINTENDENT, THE VMI FOUNDATION, INC. AND THE VMI ALUMNI ASSOCIATION

By:_____/s/_____

APPENDIX B

**IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 90-0126-R
COMMONWEALTH OF VIRGINIA, et al.,	)	

Defendants.

DEFENDANTS' SECOND STATUS REPORT

The Court's April 29, 1994 order approved Defendants' Proposed Remedial Plan ("Plan") and directed a status report of the progress of the Plan implementation every six months. Pursuant to the order, Defendants, the Commonwealth of Virginia, et al. ("the Commonwealth") file this second status report.

The United States appealed this Court's opinion and order to the United States Court of Appeals for the Fourth Circuit. On January 26, 1995, the Fourth Circuit issued its opinion affirming this Court's judgment and injunction mandating the implementation of the Plan. The appeals court also affirmed this Court's retaining jurisdiction to oversee implementation and remanded the case with

instructions that this Court include, as part of its oversight of the Plan's implementation, a specific review of the qualifications and compensation of the program administrator, the promotion of the program, the adequacy of state funding and the mechanism for continuing review of the program by qualified professional educators. United States v. Commonwealth of Virginia, et al., 44 F.3d 1229, 1242 (4th Cir. 1995). On March 20, 1995, the Fourth Circuit entered an order sua sponte "temporarily staying the issuance of the mandate." Order, Exhibit 1.

On April 28, 1995, the Court entered an order announcing that a poll failed to produce a majority of the Court in favor of rehearing. Order, Exhibit 2.

Defendants have continued to proceed with the implementation of the Plan and the commencement of the Virginia Women's Institute for Leadership ("VWIL") at Mary Baldwin College ("MBC") in the fall semester of 1995. Recruiting of high school seniors for the entering class and promotion of the VWIL program has been and continues to be conducted as described in the First Status Report (attached as Exhibit 3) and below.

As of April 28, 1995, 31 young women (of whom 29 are Virginia residents) have accepted admission to the entering class and paid deposits (nonrefundable after May 1, 1995) of $300 each. Applications for admission to the entering class received through April 17, 1995 totaled 64. Offers of admission have been extended to 52 young women. Eighteen offers are outstanding. In addition, 2 applications are pending review by the Admissions Committee. The average high school grade point average (GPA) of the students accepted into VWIL is 3.5 on a 4-point scale; the average combined SAT score is 1031.

VWIL Recruiting and Promotion. The MBC Admissions Office conducted the recruiting program for VWIL as described in the First Status Report. Lori A. Esch was primarily responsible for VWIL recruiting, and was assisted

by the admissions staff of 7 recruiters in addition to alumnae volunteers. Approximately $70,000 was expended in recruiting the entering class and identifying prospects for future classes. For the 1995 entering class, 239 prospects were identified. The MBC Admissions Office corresponded with 120 young women who responded to the mailings described in the First Status Report and interviewed 45 young women. To date, 100 prospects have been identified for the entering class of fall 1996, and 21 for the entering class of fall 1997.

MBC recruiters visited 618 high schools and high school fairs in Virginia and in 18 other states to recruit for VWIL. In addition, MBC recruiters pursued referrals from the VMI Admissions Office and from the ROTC officers stationed at VMI.

The VWIL program has also been promoted through speaking engagements by President Cynthia H. Tyson, former Acting Director of VWIL Heather A. Wilson, Professor Carrie Douglass, VWIL Director Brenda L. Bryant, staff member Crista R. Cabe, and others. Dr. Tyson has delivered approximately 20 speeches on VWIL since the first status report in October of 1994. The MBC College Relations Office has placed or provided information on VWIL for stories and reports in radio, television, newspapers and magazines, resulting in over 300 public mentions of the program nationally since October, including segments on the Fox Morning News and the Doug Wilder Show. Samples of clippings from the print media are attached as Exhibit 4.

Continued promotion of VWIL through speaking engagements and publications is one of the responsibilities of the Director of VWIL (see below).

MBC has established a budget of $50,000 for VWIL recruiting and promotion during the 1995-96 academic year.

VWIL Administration. Dr. Heather Wilson, Dean of Students, served as acting Director of VWIL through February 1995. On March 1, 1995, Dr. Brenda L. Bryant assumed the position of permanent director. Dr. Bryant's education and professional experience are described in Exhibit 5.

Dr. Bryant was selected through a nationally advertised search. The Search Committee, which was composed of two administrators, four faculty and one student, received 54 applications. The Committee considered academic credentials and/or teaching experience, community life experience, administrative skills, potential as a role model, communication skills and experience with single-gender education/support roles. The Committee conducted a further evaluation of ten candidates, including reference checks. Four finalists were selected for a full day of interviews at MBC where they met Dr. Tyson, the Search Committee, the VWIL Admissions Recruiter, the Dean of the College and various faculty and students. Dr. Bryant was the unanimous choice of the Committee.

Dr. Bryant's compensation is at the level of a dean of special programs at MBC. Her compensation and benefits are described in Exhbit [*sic*] 6, which is being filed under seal at the request of MBC. Dr. Bryant's responsibilities as VWIL director are described in Exhibit 7. Dr. Bryant, as the VWIL director, provides direction and coordination to the VWIL program. The director reports to the Dean of the College and manages program implementation through a series of advisory councils. These councils are the Advisory Council for Research and Assessment, the Inter-Divisional Academic Advisory Council for VWIL, the External Advisory Council for VWIL, the Advisory Council on Military Leadership, the VWIL Admissions Committee, the Co-Curriculum Advisory Council, and the Physical and Health Education Advisory Council. Mission statements are attached as Exhibit 8.

The VWIL operating budget for 1995-96 will depend upon the number of students enrolled in the program. A working operating budget of $182,710 was developed based on a minimum class of 10 students. Since it appears that the number of entering students will be at least twice the minimum class size, the budget for 1995-96 will be increased. The operating budget does not include faculty salaries, admissions, financial aid and other expense categories which are not administered by the VWIL Director. The budget for these other expense categories, based on 10 students, would be $375,522 in 1995-96.

VWIL Funding. The Virginia General Assembly has provided funding for Virginia women in the VWIL program in the same per capita amount as appropriated for Virginia men at VMI. For the 1995-96 academic year, this will amount to $7,308 per student. In addition, VWIL will receive an amount estimated to be $1900 per student pursuant to the per capita distribution of the Unique Military Appropriation among the Virginia Corps of Cadets, which includes the corps at VMI, VPI, and VWIL. The appropriation legislation is attached as Exhibit 9.

The VMI Foundation has also provided the funding set forth in the Agreement of September 25, 1993 and the First Amendment of September 29, 1994, previously filed with the Court as an exhibit to the Plan and Exhibit 7 to the First Status Report, respectively. The VMI Foundation has made all payments in compliance with the agreements.

In the opinion of MBC, the VWIL program is adequately funded in the Virginia biennial budget through June 30, 1996.

ROTC. Cross-enrollment agreements among MBC, VMI and the Cadets command of the United States Army and United States Navy have been executed and are attached as Exhibits 10 and 11. A cross-enrollment agreement with the United States Air Force is pending approval. In 1995-96, ROTC classes and laboratory will be conducted on the VMI

post. It is anticipated that ROTC officers will provide counseling to VWIL students at MBC. Drill and ceremony instruction will be conducted at MBC. Colonel Bissell, VMI liaison to VWIL, and the officers in charge of each of the ROTC units at VMI have been collaborating with Dr. Wilson and Dr. Bryant to schedule and arrange the ROTC courses, field exercises and other requirements for VWIL students.

Residential Regulations and Co-curricular Requirements. Dr. Bryant is developing the residential regulations and co-curricular requirements described generally in the Task Force Report which will be integral to the program goals of taught discipline and leadership training.

VWIL Uniforms. VWIL students will be issued dress and ROTC classroom uniforms and fatigues for training exercises. Uniform regulations, in addition to ROTC requirements, are being developed by Dr. Bryant. Under consideration also is an arrangement for VWIL to use the services of the quartermaster store and tailor shop at VMI.

Physical Education Program. MBC advertised nationally for a new position in its Physical Education Department which will concentrate on the physical fitness program for VWIL. Two candidates from 56 applicants have been interviewed.

A new course developed specifically for VWIL, Advanced Fitness, has been approved by the faculty. A copy of the syllabus is attached as Exhibit 12. A fitness test is being designed in accordance with national ROTC standards for women, and will measure strength as well as endurance, flexibility and body composition.

Assessment Program. The VWIL research and assessment program is designed to test cognitive development, affective learning and performance. In addition, it will determine long-term outcomes for the program, ascertain the effectiveness of the instructional program, allow for comparisons with VMI student

development and performance, provide feedback to students and contribute to an expanded understanding of the teaching of leadership to women. The research and assessment program will be monitored by the VWIL Advisory Council for Research and Assessment. In addition, the External Advisory Council for VWIL, which will be composed of experts in leadership education from outside Mary Baldwin College, will provide advice and expertise on assessment and evaluation approaches and tools. The Joint Advisory Board on Leadership Education has also reviewed the assessment plan and assessment instruments.

Joint Advisory Board on Leadership Education. The Board held its second meeting on April 7, 1995 at VMI. The agenda, minutes and attachments to the minutes, are attached as Exhibit 13.

Virginia Corps of Cadets. Dr. Tyson, President of MBC; General Knapp, Superintendent of VMI; and General Musser, VPI Commandant, have formed a committee to develop a program for the Virginia Corps of Cadets.

Cooperation with VMI. Colonel Bissell continues to serve as VMI liaison with VWIL. Consultations continue between VMI and MBC counterparts on ROTC and other military training, physical education and institutional assessment. The VMI Admissions Office makes VWIL recruiting material available at college fairs and other recruiting functions and provides referrals of young women to VWIL. In addition, ROTC officers stationed at VMI assisted in recruiting women to the VWIL.

* * *

Pursuant to the Court's order, the third status report will be filed within six months.

COMMONWEALTH OF VIRGINIA, GOVERNOR GEORGE F. ALLEN and THE STATE COUNCIL OF HIGHER EDUCATION

By: /s/

VIRGINIA MILITARY INSTITUTE, ITS BOARD OF VISITORS, SUPERINTENDENT, THE VMI FOUNDATION, INC. AND THE VMI ALUMNI ASSOCIATION

By: /s/

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO. 90-0126-R
COMMONWEALTH OF VIRGINIA, et al.,	)	
Defendants.	)	

DEFENDANTS' SUPPLEMENT TO SECOND STATUS REPORT

Defendants, the Commonwealth of Virginia, et al. ("Defendants") supplement the Second Status Report, filed April 28, 1995, as follows:

Defendants are proceeding with the implementation of the Plan and the commencement of the Virginia Women's Institute for Leadership ("VWIL") at Mary Baldwin College ("MBC") in the fall semester of 1995.

Entering Class. As of June 21, 1995, 42 young women (of whom 38 are Virginia residents) have accepted admission to the entering class and paid nonrefundable deposits.

ROTC. A cross-enrollment agreement among MBC, VMI and the United States Air Force has been finalized and is attached as Exhibit 1. 24 entering students have elected Air Force ROTC; 12 have elected Navy ROTC; and 6 have elected Army ROTC.

Cooperative Engineering Program with University of Virginia. VWIL students may participate in a dual-degree program leading to a bachelor's degree in science or mathematics from MBC and a master's degree from the University of Virginia in the fields of biomedical, civil, environmental, transportation, nuclear or systems engineering, materials science or engineering physics. The agreement between MBC and the University of Virginia is attached as Exhibit 2.

External Advisory Council. Dr. Tyson has appointed the External Advisory Council to VWIL which will be a mechanism for continuing review of VWIL by qualified educators, in accordance with the mandate of the United States Court of Appeals for the Fourth Circuit in VWIL-II. The agenda of the meeting and the composition of the Council are described in Exhibits 3 and 4. The External Advisory Council will next convene in March, 1996.

* * *

Pursuant to the Court's order, the third status report will be filed within six months of the filing of the Second Status Report.

COMMONWEALTH OF VIRGINIA, GOVERNOR GEORGE F. ALLEN and THE STATE COUNCIL OF HIGHER EDUCATION

By: /s/

VIRGINIA MILITARY INSTITUTE, ITS BOARD OF VISITORS, SUPERINTENDENT, THE VMI FOUNDATION, INC. AND THE VMI ALUMNI ASSOCIATION

By:_____/s/_____

EXHIBIT 2

Memorandum of Understanding for a Dual Degree Program
Leading to a Bachelor's Degree in Science or Mathematics
from Mary Baldwin College
and a Master's Degree in Engineering in Biomedical, Civil (Environmental or Transportation), Material Science,
Nuclear, Systems Engineering or Engineering Physics
from the University of Virginia

Introduction

This dual degree agreement makes it possible for the student to earn a Bachelor's Degree in Science or Mathematics from Mary Baldwin College and a Master's Degree in Engineering in Biomedical, Civil (Environmental or Transportation), Material Science, Nuclear, Systems Engineering or Engineering Physics from the University of Virginia in approximately five years. The program is carefully constructed to meet all degree requirements of both institutions. The dual degree candidate enrolls in the science or mathematics program at Mary Baldwin College for the first three years. During this time the student must complete 102 semester hours of work including all Mary Baldwin College general education requirements and courses required for a major in science or mathematics, including courses in chemistry, mathematics, and physics. Additional courses at Mary Baldwin College may be required for preparation for engineering, depending on the specific program the student plans to enter.

Upon condition that the Mary Baldwin College academic record is strong (i.e. a "B" average or higher, both in mathematics and science courses and overall), the student applies for admission to the University of Virginia School of Engineering and Applied Science as a conditional graduate student. The student will be expected to complete at least 30 undergraduate semester hours at the University of Virginia with a "B" average or higher and have a minimum score on the Graduate Record Examination as designated by the specific engineering program to which she is applying in order to be admitted unconditionally into the appropriate graduate program in engineering. Provided the student earns a "C" or better in each course at the University of Virginia, 30 semester hours of transfer credit will be awarded by Mary Baldwin College which, along with the previous 102 hours, complete the semester hour requirement for the Bachelor's Degree at Mary Baldwin College, as well as the requirements for a major in science or mathematics. The graduate portion of this dual degree program is intended to require approximately 12 months to obtain the degree of Master of Engineering at the University of Virginia. In some cases, the student may choose to undertake a program leading to the degree of Master of Science. Such a program normally requires a longer time (typically one and one-half years) because of the research component of the program.

It is also agreed that authorities at either school will notify those at the other of any changes which affect these programs, with at least one year advance warning.

This agreement has been developed in the firm belief that it provides a valuable new educational opportunity for the citizens of the Commonwealth of Virginia using the existing facilities of Mary Baldwin College and the University of Virginia.

Guidelines and Procedures

(1) To be qualified for the dual degree program, the student must have completed at least 102 semester hours including all general education requirements at Mary Baldwin College. Moreover, the student must have completed four semesters of calculus, including ordinary differential equations; two semesters of chemistry; two semesters of calculus-based physics; and other courses as required for a major in science or mathematics. The student must have a "B" average overall and demonstrated strength in mathematics and science.

(2) To apply for admission to the dual degree program, the student must have the approval of the Dean of the College at Mary Baldwin.

(3) The student then applies for admission to the School of Engineering and Applied Science as a **conditional** graduate student in the appropriate area of engineering. The Mary Baldwin Coordinator for the dual degree program will advise and assist the student in the application process. The application must be submitted directly to Graduate Studies, Office of the Dean, School of Engineering and Applied Science. Deadlines for completed applications are: December 1 for January admission, May 1 for June admission, and August 1 for September admission. At the same time, the student should also notify the administrator for these programs at the University of Virginia.

(4) The student, once admitted to the program, spends the fourth year at the University of Virginia, taking appropriate basic undergraduate courses in engineering and applied science. It is not necessary that all courses taken at UVA be engineering courses or even technical courses. The courses for each student will be selected to provide a useful introduction to engineering while fulfilling the Bachelor's Degree requirements at Mary Baldwin, and will be based on the specific engineering discipline and the advice of the faculty advisor at UVA.

(5) Upon completion of the 30 semester hours at UVA, with individual course grades of "C" or above, the student is awarded the baccalaureate degree from Mary Baldwin College.

(6) After completion of the 30 semester hours at UVA with a "B" average or higher, the student will be eligible for admission into the graduate program in the appropriate area of engineering, provided a satisfactory GRE score has been attained. Typically, this score should be at least 1250, but the various departments commonly grant exceptions provided a basis for doing so exists in the form of a particularly strong course-work record.

Students may also apply to the other engineering programs (Electrical, Mechanical, Chemical, and Aerospace) though these programs are not part of this formal agreement.

(7) A student who elects to pursue a course of studies leading to the degree Master of Engineering may complete that program in approximately one full calendar year (that is, two semesters and one summer). A student in a program leading to the degree Master of Engineering is not eligible for a graduate research assistantship (GRA) or graduate teaching assistantship (GTA).

(8) A student who elects to pursue a course of studies leading to the degree Master of Science may expect to complete that program in about one and one-half years. Financial aid may be available in the form of a graduate research assistantship for such a student. The graduate research assistant is expected to spend a significant amount of time on research directed by a faculty advisor and to present the result of his/her research in an M. S. thesis.

(9) Mary Baldwin College will designate a faculty member the On-Campus Coordinator of the program and will make the dual degree program known to current and prospective students. The University of Virginia School of Engineering and Applied Science will provide the Mary

Baldwin Coordinator with current catalogues, application forms, and other materials necessary for students interested in the program. Also, the School of Engineering and Applied Science reserves the right to limit the number of dual degree candidates admitted to the program.

(10) The agreement will be evaluated every five years by designated representatives from both institutions.

Mary Baldwin College	**University of Virginia**
/s/	/s/
James Lott Dean of the College	Richard W. Miksad Dean of the School of Engineering and Applied Science
Date: May 25, 1995	Date: 6/1/31 [*sic*]

EXHIBIT 3

[SEAL]

Mary Baldwin College

From the Office of College Relations
For More Information: 703/887-7009

For Immediate Release:
June 20, 1995

For More Information:
Crista Cabe or Sara O'Connor
703-887-7011

External Advisory Council for the Virginia Women's Institute for Leadership Holds Inaugural Meeting on the Mary Baldwin College Campus

On June 16, 1995, the External Advisory Council for the Virginia Women's Institute for Leadership held its inaugural meeting at Mary Baldwin College in Staunton, Virginia. The purpose of the External Advisory Council is to recommend instructional content and methods, to recommend methods and tools for assessing the performance of the Institute, and to provide an external perspective on the teaching of leadership. The members of the council are experts in leadership and leadership education, including military education. A VWIL student will be appointed to the council in the fall.

Dr. Brenda Bryant, director of VWIL, said, "VWIL will be a flagship program unique in undergraduate education. We are looking for the best advice from outstanding experts on leadership."

The agenda of the meeting included an overview of the goals and objectives of VWIL, a review of the program's academic and physical education requirements, and a discussion of research and evaluation opportunities.

The advisory council is composed of 11 distinguished members. Six attended the June 16 meeting, including Dr. Linda K. Bunker, Dr. Kenneth E. Clark, Miriam B. Clark, Dr. James E. Colvard, Sally Helgesen and Dr. Curtis J. Smith. Dr. Gloria Randle Scott, Dr. Howard T. Prince, Dr. Josiah Bunting, Sara King and Susan Estrich were unable to attend.

Dr. Linda K. Bunker is an internationally renowned sport psychologist and the associate dean for academic and student affairs in the Curry School of Education at the University of Virginia. Dr. Bunker has authored or co-authored 10 books and has been extensively involved in leadership programs for women.

Dr. Kenneth E. Clark is the Smith Richardson Senior Scinist at the Center for Creative Leadership in Greensboro, North Carolina. He has consulted widely on leadership and is the past president of the American Board in Professional Psychology. He is the co-author of *Impact of Leadership* and *Choosing to Lead*, and he edited for 10 years the *Journal of Applied Psychology*.

Miriam B. Clark is the former associate dean in the College of Arts and Science at the University of Rochester and an educational consultant. With Kenneth Clark, she was co-editor of *Leadership Education: A Source Book and of Measures of Leadership*, and the co-author of *Impact of Leadership* and *Choosing to Lead*.

Dr. James E. Colvard of King George, Virginia, serves as a senior fellow in the Office of the President at the Center for Naval Analysis. He is an expert in management, leadership and the civilian-military interface.

Writer Sally Helgesen of New York City is the author of *The Female Advantage: Women's Ways of Leadership*, a

book which has been hailed as "the classic book" on women leaders.

Dr. Howard T. Prince, II was appointed to be the founding dean of The Jepson School of Leadership Studies at the University of Richmond in 1990. Dr. Prince is a clinical psychologist and has published widely on contemporary leadership topics.

Dr. Curtis J. Smith brings to the panel extensive experience in personnel management and development. He is the director of the Federal Executive Institute, the government's residential facility for executive development in Charlottesville, Virginia

Dr. Gloria Randle Scott is the 11th president of Bennett College, a historically black college for women in Greensboro, North Carolina. She has distinguished herself as a leader in higher education and an advocate of women's issues.

Dr. Josiah Bunting is the headmaster of The Lawrenceville School in Lawrenceville, New Jersey, and the former president of Hampden-Sydney College. He also served as a major in the U.S. Army.

Sara King is a program director at the Center for Creative Leadership. Along with this, she is coeditor of two Center publications which highlight leadership education programs and courses in higher education settings.

Susan Estrich is a professor of law and political science at the University of Southern California. She writes frequently about issues involving law and gender.

Mary Baldwin College faculty and staff members participated in the External Advisory Council meeting as well. The council plans to meet twice a year to provide ongoing advice and review of the VWIL program.

(5)

No. 94-1941

Supreme Court, U.S.
FILED
AUG 16 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

COMMONWEALTH OF VIRGINIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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UNITED STATES OF AMERICA, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Nothing in respondents' brief in opposition calls into question the need for this Court to review and reverse the decision below.

1. Respondents contend (Br. in Opp. 29-30) that this case raises no issue of substantial importance, but the central issue it addresses is a recurring one in anti-discrimination law. All individuals belong to racial, gender, and ethnic groups. The "average" or "typical" aspirations or abilities of the members of those groups often differ substantially from group to group. Those differences raise the question whether an individual may be denied an opportunity because he or she has aspirations or abilities that differ significantly from those of the

average member of the group to which the individual belongs.

The Court's answer to that question has always been that equal protection rights are individual rights, not group rights. Individuals have a fundamental right to be treated on the basis of their *own* abilities and capacities. They may not be denied opportunity because most members of their race have different characteristics from their own. Thus, at a time when racial segregation was constitutionally permissible, the Court nevertheless held that a black person could not be denied admission to a white law school on the ground that not enough blacks were interested in studying law to justify the establishment of a black law school as well. *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938). The equal protection right of the black law school applicant was "a personal one," and he was entitled to be furnished an educational program equal to that provided to whites "whether or not other negroes sought the same opportunity." *Id.* at 351. And as early as 1914 the Court held that the failure to offer black travelers luxury railroad accommodations that whites enjoy could not be justified on the ground that too few black travelers could afford such accommodations. The rights of black travelers who could afford the accommodations were equal to those of whites who could afford them. *McCabe* v. *Atchison T. & S.F. Ry.*, 235 U.S. 151. See also Pet. 19-26. This case raises the question whether the protection against sex discrimination that the Equal Protection Clause affords provides the same level of individual protection as was provided by *Gaines* and *McCabe*.

Respondents argue that sex-segregated education is justified, and that separate educational programs may then be tailored to what "most" women or the "average"

woman would want or enjoy. As a result, respondents say that women can be excluded from a unique program that they wish to attend and for which they qualify, and be relegated instead to a substantially different program that they do not want and that does not meet their needs, solely because most women would not be inconvenienced by that result. At a time well before the adoption of strict scrutiny for racial classifications, when separate but equal racial treatment was constitutionally permissible, the Court repeatedly rejected that contention when it would have excluded individual black people from securing treatment or opportunity equal to whites. The question now before the Court is whether the same analysis applies in the law of sex discrimination.

2. Respondents assert that this case does not warrant further review because the United States "simply disagrees with the factual findings" made by the district court that the substantial differences between VMI and VWIL are justified by "non-stereotypical differences" between most men and most women. Br. in Opp. 19; see also *id.* at 21-25. They contend that VMI's sex-based exclusionary policy is justified by factual findings showing "psychological and sociological differences" between men and women that are "real differences, not stereotypes." *Id.* at 22. Those findings, they assert, are "fatal" to the petition, dissolving any conflict between the judgment below and the decisions of this Court. *Id.* at 24.

The district court's factual findings in no way affect the need for this Court's review. The court of appeals' decision approving the remedy in this case is squarely in conflict with this Court's equal protection cases even assuming the complete correctness of the district court's factual findings. As we have noted, Pet. 23, the district court did not find that the sex-based differences it

identified were generally true of all women and all men. See Pet. 23-26. Rather, the district court found, for example, that "most women" of college age are less confident than men, App. 64a, that a cooperative as opposed to an adversative method would be more appropriate for "most" women, *id.* at 63a, and that women "tend to" thrive in certain educational settings, while men "tend to" have certain educational needs, *id.* at 224a.

At the same time, the district court expressly found that some women are fully suited for a VMI education. It found, for example, that some women "would want to attend [VMI] if they had the opportunity," App. 174a, that "the VMI methodology could be used to educate women" and that some women "may prefer the VMI methodology to the VWIL methodology," *id.* at 76a.[1] The court also found that "some women are capable of all of the individual activities required of VMI cadets." *Id.* at 170a. The district court found that "15% of females in the applicant pool could successfully meet the requirements of the current VMI physical fitness test," *id.* at 234a, and respondents' own expert testified that "successful recruitment of women would likely yield VMI a cadet corps of approximately 10% women," *id.* at 231a. The 10% figure "was accepted by VMI's Mission Study Committee," *id.* at 232a. In other words, the only "real" differences the district court even purported to find were differences between *most* women and *most* men, not differences that could possibly be described as accurate as applied to all or even almost all women and men.

[1] See also App. 223a (quoting respondents' expert's testimony that "I'm not saying that some women don't do well under an adversative model, undoubtedly there are some who do.").

The court of appeals' reliance in *VMI II* on generalizations about gender that are admittedly not universally valid is a factor that weighs in favor of this Court's review. This Court's cases uniformly hold that sex cannot be used as an inexact proxy for more relevant bases of classification. See Pet. 24-26 & nn.20 & 21 (citing cases).[2] Respondents do not—and cannot—identify a single case since Justice Bradley's discredited concurrence in *Bradwell* v. *The State*, 83 U.S. (16 Wall.) 130, 141 (1872), that upholds a sex-based classification based on psychological or sociological comparisons between most women and most men; the Court has upheld sex as a proxy only when different treatment was based on differences that were universally applicable because of biological or legal requirements.[3] The conflict between

[2] This Court recently reaffirmed "the basic principle" that the Fourteenth Amendment "protect[s] *persons*, not *groups*." *Adarand Constructors, Inc.* v. *Peña*, 115 S. Ct. 2097, 2112 (1995); see also *id.* at 2113 (emphasizing that the right to equal protection is a "personal right"). Additional considerations may of course be brought to bear in devising remedies for discrimination. See *id.* at 2117: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."

[3] This Court in *J.E.B.* v. *Alabama*, 114 S. Ct. 1419 (1994), invalidated sex-based peremptory challenges precisely because they amount to reliance on such sex-based generalizations. "Striking individual jurors on the assumption that they hold particular views simply because of their gender is 'practically a brand upon them, affixed by law, an assertion of their inferiority.'" *Id.* at 1428 (quoting *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1879)). In approving a statutory rape law that applied differently to men and women, this Court expressly disavowed relying, as the district court did here, on males' greater aggressiveness, and instead relied on the anatomical fact that "females can become pregnant as the result of sexual

the Fourth Circuit's decision and this Court's precedents could hardly be more direct: Under the court of appeals' analysis, had the district court in *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1952), simply found as a fact, as it certainly could have, that more women than men preferred to be nurses, or that women "tend to" be better suited for nursing because "most" women had more nurturing and tolerant personalities than "most" men, the sex-based exclusion from an educational program would have been upheld. *Hogan* does not rest on such a slender reed.

3. Respondents similarly assert (Br. in Opp. 27-29) that women cannot be admitted to VMI because their presence would "destroy" VMI, and they contend that question is a factual one not worthy of review. Their assertion is contrary to the holding of the court of

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intercourse; males cannot." *Michael M.* v. *Superior Court of Sonoma County*, 450 U.S. 464, 475, 478 (1981) ("the statute does not rest on the assumption that males are generally the aggressors").

Respondents rely on *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975) (Br. in Opp. 26 n.23). The Court there upheld a federal statute that afforded women Naval officers longer than men to gain promotion or face mandatory discharge, not because of any notion that women's personalities or sociological role make them achieve promotions more slowly, but because legal restrictions on all women in combat and sea duty—which were not challenged—made women and men "*not* similarly situated with respect to opportunities for professional service." 419 U.S. at 508. The Court emphasized that, in those Navy corps in which promotion opportunities would be unaffected by the combat and sea-duty restrictions, men and women officers were treated the same. *Id.* at 509. See also *Rostker* v. *Goldberg*, 453 U.S. 57, 78 (1981) (upholding draft registration for men and not for women because unchallenged combat restrictions on all women made the sexes "simply not similarly situated for purposes of a draft or registration for a draft").

appeals, which expressly approved the admission of women to VMI as a viable remedial alternative.

In any event, the district court's determination that the presence of women would "destroy" VMI is a legal, as opposed to factual, conclusion. It addresses the materiality of changes in VMI's program likely to occur as a result of coeducation. The district court viewed any change, no matter how slight, as tantamount to the wholesale obliteration of VMI; it then concluded that preservation of VMI exactly in its existing form, and for the exclusive benefit of men, is more important than making a VMI education equally available to women. Both those legal conclusions are incorrect: The minor changes the district court predicted as a result of coeducation would not materially alter the essential attributes of a VMI education, and the effect, if any, that such changes would have on men's experience at VMI cannot outweigh the equal protection rights of individual and admittedly qualified women to be considered for admission to VMI without regard to their sex. It is, of course, well established that a benefit cannot be denied to one sex merely to preserve it for the other. *Hogan*, 458 U.S. at 731 n.17.

The district court's factual findings themselves show that VMI can admit women without materially changing its program. For example, the district court found that at least some women could perform all the rat line tasks, the current physical training and military drills, and could pass the VMI physical fitness test. App. 233a-234a.[4]

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[4] See defendants' witnesses' testimony compiled in *VMI I*, 91-1690 C.A. App. 357-358 (regarding the physical training and military drill, "we probably could have women come in here and many of them probably could do some of these things, or maybe all of them"); *id.* at 362 (women could "whack through mechanically a rat line and they could go through the motions of a rat line," but it would affect the

Admission of women would "have little or no effect" on the ROTC program, and would not materially affect the academic program. App. 241a-242a; 91-1690 (*VMI I*) C.A. App. 989. There was no evidence that the admission of women would affect the class system, the dyke system, or the honor code.

It is irrelevant that not all women would qualify for admission to VMI, since the vast majority of men are also unsuited to attend the school, and many of the men who do attend fall short of the overall standards in some respects. For example, almost 50% of new cadets fail the physical fitness test and are offered remedial training. 91-1690 (*VMI I*) C.A. App. 564-565. Toleration of women's performance at VMI at a range of levels would no more undermine the VMI ethic of "egalitarianism" than do those allowances already made for men.[5]

"brother rat" spirit); *id.* at 984 ("there isn't anything that happens in the rat line that I know about, that a woman could not do"). Although the district court found that "a majority" of women could not perform rat training "at the same levels as males," App. 234a, the relevant question is not, as we have said, what a majority of women can do. See pages 4-6, *supra*.

[5] Allowing women and men privacy from the opposite sex when dressing or using the bathroom need not, of course, affect the cadets' lack of privacy from members of their own sex, and respondents have identified no reason why close scrutiny of individuals by the entire group in all other respects could not be maintained.

The special steps taken to address the needs of black students (first admitted to VMI in 1968) additionally suggest that minor efforts to facilitate the introduction of women at VMI would not destroy the institution. For example, VMI's 1990-1991 budget proposed that it expend $22,000 for "Retention of Black Cadets," a special program for blacks identified in the budget. App. 229a-230a. In the Fall of 1983, "[a] program for the retention and effective performance of black freshmen was initiated at VMI." 91-1690 (*VMI I*) C.A. App. 1435. That program addressed, among other things, the "[s]ocial-cultural support

4. Contrary to respondents' contention (Br. in Opp. 22), the "special intermediate scrutiny" test the court of appeals devised for dual single-sex schools is plainly wrong, conflicts with *J.E.B.* v. *Alabama*, *supra*, *Hogan*, and *Sweatt* v. *Painter*, 339 U.S. 629 (1950), and requires correction by this Court. The court of appeals' approval of VWIL was possible only because the court invented a new, weakened, and incorrect constitutional test.

a. Whereas *Hogan* requires that the State have at least an important policy to support any sex-based classification, the court of appeals' test defers to the State's articulated rationale so long as it is "not pernicious." App. 18a. Under that test, the court of appeals accepted providing "single-gender education" as Virginia's non-pernicious objective. *Ibid*. The correct constitutional analysis, however, inquires whether the State's use of a sex-based classification (including single-sex college admissions policies) serves important interests; a State's desire to provide education on a single-sex basis is not, without more, automatically an important interest under *Hogan*. That desire is particularly inadequate to support the maintenance of the very single-sex admissions policy that the court of appeals had already correctly held violated the Equal Protection Clause.

b. Respondents erroneously assert that *Sweatt* v. *Painter*, *supra*, is inapplicable (Br. in Opp. 20-21), and that even the court of appeals' toothless "substantive comparability" requirement imposes an "unduly high burden on respondents" (*id.* at 22 n.17). Although *Sweatt* addressed the appropriate remedy for racial discrimination and this case seeks a remedy for discrimina-

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and black student morale within a dominantly white institution." *Id.* at 1438.

tion based on sex, equality of treatment is required in both areas absent a justification that is compelling (in the case of race) or exceedingly persuasive (in the case of sex).

The court of appeals' failure to require such equality of treatment, and its application instead of a wholly novel test of "substantive comparability" that tolerates relegating women to VWIL notwithstanding that it "differs substantially from the VMI program," App. 55a, squarely conflicts not only with *Sweatt*, but also with this Court's cases requiring heightened constitutional scrutiny of sex-based classifications. This Court acknowledged the importance of that conflict when it granted the writ of certiorari in *Vorchheimer* v. *School Dist.*, 532 F.2d 880 (3d Cir. 1976), cert. granted, 429 U.S. 893 (1976), aff'd by an equally divided court, 430 U.S. 703 (1977). The Court granted review of the question whether dual, single-sex schools are constitutional where they "reserve to males and deny to females access to the school distinguished by its national reputation, superior resources and scientific facilities." Pet. at 2, *Vorchheimer* v. *School Dist.*, No. 76-37. Because the Court was equally divided in *Vorchheimer*, it did not resolve the issue. It should do so now.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

AUGUST 1995

No. 94-1941

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER, AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, B'NAI B'RITH WOMEN, CENTER FOR ADVANCEMENT OF PUBLIC POLICY, CENTER FOR WOMEN POLICY STUDIES, COALITION OF LABOR UNION WOMEN, CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, EQUAL RIGHTS ADVOCATES, FEDERALLY EMPLOYED WOMEN, INC.,

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NATIONAL ORGANIZATION FOR WOMEN,
THE NATIONAL WOMAN'S PARTY,
NATIONAL WOMEN'S CONFERENCE COMMITTEE,
NATIONAL WOMEN'S POLITICAL CAUCUS,
NOW LEGAL DEFENSE AND EDUCATION FUND,
TRIAL LAWYERS FOR PUBLIC JUSTICE,
WOMEN EMPLOYED,
WOMEN'S LAW PROJECT, AND
THE WOMEN'S LEGAL DEFENSE FUND

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1941

UNITED STATES OF AMERICA
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER, AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, B'NAI B'RITH WOMEN, CENTER FOR ADVANCEMENT OF PUBLIC POLICY, CENTER FOR WOMEN POLICY STUDIES, COALITION OF LABOR UNION WOMEN, CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, EQUAL RIGHTS ADVOCATES, FEDERALLY EMPLOYED WOMEN, INC., NATIONAL COUNCIL OF JEWISH WOMEN, INC., NATIONAL COUNCIL OF NEGRO WOMEN, NATIONAL EDUCATION ASSOCIATION, THE NATIONAL GAY AND LESBIAN TASK FORCE, NATIONAL ORGANIZATION FOR WOMEN, THE NATIONAL WOMAN'S PARTY, NATIONAL WOMEN'S CONFERENCE COMMITTEE, NATIONAL WOMEN'S POLITICAL CAUCUS, NOW LEGAL DEFENSE AND EDUCATION FUND, TRIAL LAWYERS FOR PUBLIC JUSTICE,

WOMEN EMPLOYED, WOMEN'S LAW PROJECT, AND THE WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF THE PETITION

INTERESTS OF *AMICI*

Amici curiae are organizations strongly committed to achieving equity for women and have a demonstrated record in pursuing that goal. Each has an abiding interest in assuring the sound interpretation and application of the protections guaranteed by the Fourteenth Amendment. Descriptions of the individual organizations are set forth in the attached appendix.[1]

REASONS FOR GRANTING THE PETITION

This is as important a Constitutional gender-discrimination case as this Court has ever addressed. For 150 years, Virginia has offered men the opportunity to attend the prestigious Virginia Military Institute ("VMI"), and has denied that opportunity to women. The court below properly found that this practice violates the Equal Protection Clause. Virginia responded not by integrating VMI or by withdrawing state funding, but by creating a pallid alternative open only to women—the Virginia Women's Institute for Leadership ("VWIL"), a four-hour-per-week leadership program at nearby Mary Baldwin College, a women's school.

VWIL is completely different from and inferior to VMI in virtually every way. Under VMI's distinctive educational model, cadets must reside in spartan barracks, where they are subject to constant scrutiny and minute regulation; VWIL students would live in a standard dormitory among non-VWIL students at Mary Baldwin. VMI imposes a stringent military system under

[1] The parties' written consent to the filing of this brief has been filed with the Court.

which discipline permeates every aspect of daily life; VWIL students will merely take part in standard ROTC training. VMI employs the rigorous adversative method —including the first-year "rat line"—to instill leadership qualities in its cadets; VWIL has no such fundamental component. VMI offers degree programs in engineering; Mary Baldwin College (and therefore VWIL) provides a limited science curriculum and no Bachelor of Science degree. And, of course, VWIL lacks altogether the reputation, tradition, and prestige that distinguish VMI and provide special opportunities to VMI graduates.

In determining whether Virginia had remedied its equal protection violation by creating VWIL, the court below agreed that VMI and the four-hour-per-week women's leadership institute were not equal. Moreover, the court below did not find that the State had an "exceedingly persuasive jusification" for discriminating against women, or that the State had advanced an "important state interest." This Court's long established equal protection jurisprudence therefore required the court to rule against Virginia.

Instead, the court below invented out of whole cloth what it described as a "special intermediate scrutiny test." Not only is that test less protective than the intermediate scrutiny standard applied by this Court for over two decades, but it is even more lax than the "separate but equal" doctrine discarded by this Court forty-one years ago. The new test requires only that the state not have a "pernicious" purpose in offering single-gender education, that the gender-based classification be substantially related to that purpose, and that the state offer men and women "substantively comparable" benefits. A. 17a. This toothless new standard conflicts with numerous decisions of this Court, including *J.E.B.* v. *Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994); *Mississippi University for Women* v. *Hogan*, 458 U.S. 718 (1982); *Kirchberg* v. *Feenstra*, 450 U.S. 455 (1981); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); and *Sweatt* v. *Painter*, 339 U.S. 629 (1950).

To make matters worse, in applying the "substantively comparable" prong of its new test, the court relied on overbroad and outmoded stereotypes of the relative capabilities of men and women. A. 22a, 25a-26a. The court then concluded that Virginia had satisfied the demands of the Equal Protection Clause.

That the court below so badly misinterpreted the intermediate scrutiny test indicates that it is time for this Court to declare that gender discrimination against women must be subject to strict scrutiny.

If this Court allows the decision below to stand, it will have a devastating impact on both women and men. The Court will have endorsed a decision authorizing states to track men and women into different careers and social roles, without the searching inquiry such discriminatory practices demand. Allowing the states to determine an individual's opportunities based upon his or her sex is antithetical to the Equal Protection Clause, is contrary to clearly established law, and is fundamentally unfair. This Court should grant the petition and reverse.[2]

I. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT

A. The Alternative Program Offered To Women Fails To Satisfy Intermediate Scrutiny

This Court's gender discrimination precedents are clear. Gender-based classifications require an exceedingly persuasive justification. *J.E.B.*, 114 S. Ct. at 1425; *Hogan*, 458 U.S. at 724; *Kirchberg*, 450 U.S. at 461. Where, as here, a state employs a classification which on its face discriminates against women, the state bears the burden of proving that "the classification serves 'important governmental objectives and that the discriminatory means employed' are substantially related to those objectives" *Hogan*, 458 U.S. at 724; *see also J.E.B.*, 114 S. Ct. at 1425-26; *Craig* v. *Boren*, 429 U.S. 190, 197 (1976).

There is no question that Virginia's exclusion of women from VMI fails this test. The state premised VMI's exclusion of women, and the alternative women-only VWIL program, on overbroad assumptions about women's capacity and desire to succeed at VMI, *see, e.g.*, A. 22a, 25a-27a, 64a, 72a-76a, 84a—" 'the very stereotype the law condemns.' " *J.E.B.*, 114 S. Ct. at 1426 (quoting *Powers* v. *Ohio*, 499 U.S. 400 (1991)).

B. The "Special Intermediate Scrutiny" Test Invented Below Conflicts With This Court's Precedents

Rather than follow established law, the court below invented out of whole cloth what it described as a new "special intermediate scrutiny test." A. 13a. Under this "special intermediate scrutiny," the state must show three things:

> (1) that its objectives are "not pernicious" and "fall[] within the range of . . . traditional governmental objective[s]." A. 22a;
>
> (2) that "the gender classification adopted is directly and substantially related to that purpose;" A. 17a; and
>
> (3) that it provides men and women benefits which are "substantively comparable." A. 17a.

This new test conflicts squarely with this Court's well-established precedents. First, this Court has made clear that the government must do more than show that its objectives are not pernicious. As the Court has often repeated, most recently in *J.E.B.*, gender classifications

[2] A decision by the Court in this case will also directly affect Shannon Faulkner, who is not a party to this case. In parallel litigation, Faulkner is seeking admission to the Citadel, a South Carolina institution that, like VMI, excludes women. South Carolina, at the direction of the Fourth Circuit, *see Faulkner* v. *Jones*, 51 F.3d 440 (4th Cir. 1995), is now developing a program for Faulkner modeled on VWIL, even though Faulkner has consistently maintained that if given the choice required by the Equal Protection Clause, she would choose the Citadel over a VWIL-style women-only program.

require an "exceedingly persuasive justification." *J.E.B.*, 114 S. Ct. at 1425; *Hogan*, 458 U.S. at 724. Accordingly, the state must show the classification serves an "important state purpose," not simply a non-pernicious one. *See, e.g., Hogan*, 458 U.S. at 730 (all-women nursing school unconstitutional because state failed to articulate a sufficiently important objective).

Second, this Court has time and again stressed the importance of scrutinizing carefully the fit between the state purpose and the gender classification. *See, e.g., Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 150-51 (1980) (state purpose valid, but unconstitutional because gender classification unnecessary to serve that purpose); *Orr* v. *Orr*, 440 U.S. 268, 281-82 (1979) (same); *Weinberger* v. *Weisenfeld*, 420 U.S. 636, 651-52 (1975) (same). Though reciting that such scrutiny was required, the court below effectively eliminated it by finding the provision of single-gender education itself to be an acceptable end.[3] There will always be a fit between this end and the employment of gender classifications, and the second prong of the "special intermediate scrutiny" test thus carries no weight.

Finally, the Fourth Circuit added an entirely unprecedented prong to the test by permitting the exclusion of one gender from a state program if the state offers some members of that gender "substantively comparable" alternatives. This "substantively comparable" test is contrary to, and even more lax than, the "separate but equal" test of *Sweatt* v. *Painter*, 339 U.S. 629 (1950), a test this Court rejected as too lenient in *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

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[3] While single-gender education may be justified by a compensatory purpose, *see Hogan*, 458 U.S. at 728, there is no such purpose here.

In *Sweatt*, this Court considered the plight of an African-American student denied admission to the University of Texas Law School on the basis of his race. Although Texas proposed to open a separate law school for non-whites (and thereby to comply with the separate-but-equal regime permissible under pre-*Brown* jurisprudence), the Court rejected this half-measure:

> [W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of the number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior.

339 U.S. at 633-34. Moreover, the Court explicitly noted that "position and influence of the alumni, standing in the community, traditions and prestige" all weighed so heavily in favor of the established school as to render a parallel institution inherently unequal. *Id.* at 634.

The similarities between *Sweatt* and this case are striking. There, as here, the lower courts recognized that an equal protection violation had taken place, yet improperly permitted the establishment of a parallel program as the remedy. In this case, too, the separate VWIL program is an anemic imitation of the original, lacking not only VMI's physical facilities and educational rigor, but also those intangible factors (reputation, tradition, prestige) whose importance the Court underscored in *Sweatt*. For all these reasons, it is as difficult to believe here as it was in *Sweatt* that a person who desired a VMI education and "had a free choice between these . . . schools would consider the question close." *Id.* at 634.

C. The Fourth Circuit's Application Of The "Special Intermediate Scrutiny" Test Is Directly Contrary To This Court's Decision In *Mississippi University for Women v. Hogan*

In *Mississippi University for Women* v. *Hogan*, the Court struck down Mississippi's all-women nursing school. The lower court's approach is so far out of line with this Court's teachings that *Hogan* would likely come out the other way under "special intermediate scrutiny." First, the State purpose deemed sufficient by the Fourth Circuit in the present case—the provision of single gender education—is equally applicable to Mississippi's operation of the all-female nursing school in *Hogan*. Second, the gender-based classification at issue in *Hogan*, the exclusion of men from a nursing school, was no less related to the State's desire to provide single-gender education than is the case here. Finally, had the *Hogan* Court inquired into whether substantively comparable benefits were available to the excluded gender—which it refused to do—Mississippi's exclusion of men from a nursing school may well have passed such a test. If a totally different and inferior program at VWIL can be considered substantively comparable to VMI, then it would be hard to imagine that the alternative Mississippi offered—two nursing schools available to men in other locations—would not be substantively comparable to the all-women nursing school under the Fourth Circuit's test. Yet the *Hogan* Court properly applied intermediate scrutiny to strike down the single-gender school. The Fourth Circuit should have done likewise.

In short, "special intermediate scrutiny" is a misnomer for the test invented by the court below. That test has nothing in common with the intermediate scrutiny this Court has developed. The lower court's test had only one purpose—to allow Virginia to preserve anachronistic and blatantly discriminatory institutional practices. This Court should grant the petition and reverse the decision below.

II. THE COURT SHOULD TAKE THIS OPPORTUNITY TO RECOGNIZE THAT SEX-BASED DISCRIMINATION WARRANTS STRICT SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE

This Court has explicitly left open the question whether gender-based classifications should be analyzed under the intermediate scrutiny described in *J.E.B.* and *Hogan*, or whether, like racial classifications, they are subject to sctrict scrutiny. *See J.E.B.*, 114 S. Ct. at 1425 n.6; *Hogan*, 458 U.S. at 724 n.9; *Harris* v. *Forklift Sys.*, 114 S. Ct. 367, 373 (1993) (Ginsburg, J., concurring). While Virginia's denial of a VMI education to women does not survive intermediate scrutiny as properly interpreted under this Court's precedents, this Court should now take the opportunity to apply strict scrutiny to gender-based discrimination.

First, this Court has often recognized the long and tortured history of discrimination against women in this country. *See, e.g., J.E.B.*, 114 S. Ct. at 1425 (recognizing similarities between historic discrimination against women and minorities); *Hogan*, 458 U.S. at 725 n.10 ("History provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function."); *Frontiero* v. *Richardson*, 411 U.S. 677, 684-85 (1973) (acknowledging that "our Nation has had a long and unfortunate history of sex discrimination," and recognizing that "throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes") (plurality opinion). This history, coupled with the continuing reliance on gender-based stereotypes to limit women's opportunities, as has occurred in this case, supports the application of strict scrutiny to gender-based classifications which disadvantage women.

Second, the difficulty lower courts like the Fourth Circuit have had in properly applying intermediate scrutiny warrants that this Court now hold that gender-based discrimination requires strict scrutiny. The decision below, which relies on gender-based stereotypes to support the State's denial of equal opportunity to women, and which creates a special new test out of whole cloth, exemplifies the misapplication of intermediate scrutiny to gender-based qualifications.

Another similar misapplication is the Fourth Circuit's recent decision in *Faulkner* v. *Jones*, 51 F.3d 440 (4th Cir. 1995), which left open the possibility that South Carolina will be permitted to deny women the benefits of a Citadel education by operating an alternative, inferior leadership training program for women. *See id.* at 450 (Hall, J., concurring) (". . . I am convinced that we have embarked on a path that will inevitably fall short of providing women their deserved equal access to important avenues of power and responsibility."). Moreover, the *Faulkner* court in dicta espoused yet another curious wrinkle in its misinterpretation of intermediate scrutiny, suggesting that while an absence of demand among women as a group may not justify the deprivation of an individual's civil rights based on gender, it may justify a deprivation of "an economic benefit" such as "single gender education," based on that individual's gender. *See id.* at 445. This suggestion is entirely without support in this Court's precedents.

Other courts have also misapplied intermediate scrutiny to uphold invidious gender-based classifications. For example, before this Court decided *J.E.B.*, numerous courts had upheld gender-based peremptory strikes based on traditional and overbroad stereotypes about the relative abilities of men and women. *See, e.g., United States* v. *Broussard*, 987 F.2d 215, 218-20 (5th Cir. 1993); *United States* v. *Nichols*, 937 F.2d 1257, 1262-64 (7th Cir. 1991), *cert. denied*, 502 U.S. 1080 (1992); *State* v. *Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989).

Finally, the Court's recent decision in *Adarand Constructors, Inc.* v. *Pena*, 63 U.S.L.W. 4523 (U.S. June 12, 1995), subjecting race-based affirmative action programs to strict scrutiny, coupled with its earlier decision in *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), provides yet another reason for extending strict scrutiny to gender-based discrimination. It would hardly be justified under equal protection principles if the government had more leeway to discriminate against women than to enact affirmative action programs, such as that at issue in *Adarand*, designed to remedy discrimination against minorities. Unless all gender classifications are subject to strict scrutiny, such an anomaly results.

Moreover, as a practical matter, it may be easier for the government to discriminate against women than to enact affirmative action programs designed to remedy discrimination against women. Many affirmative action programs, like that at issue in *Adarand*,[4] are designed to remedy discrimination against both minorities and women. Although not required by this Court's precedents, public policy-makers may continue to treat women and minorities similarly under these programs, thereby applying the

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[4] One of the federal programs discussed in *Adarand* presumed that women as well as members of minority groups were "socially and economically disadvantaged individuals," and created incentives to encourage the awarding of federal contracts to such individuals. While nothing in *Adarand* or in *Croson* supports the application of strict scrutiny to gender-based affirmative action programs, some courts have already improperly subjected such programs to strict scrutiny. *See Brunet* v. *City of Columbus*, 1 F.3d 390 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1190 (1994) (applying strict scrutiny to gender-based affirmative action plan); *Conlin* v. *Blanchard*, 890 F.2d 811 (6th Cir. 1989) (same); *Cone Corp.* v. *Hillsborough Cty.*, 723 F. Supp. 669 (M.D. Fla. 1989) (same). *But see Associated General Contractors* v. *San Francisco*, 813 F.2d 922, 941 (9th Cir. 1987) (applying intermediate scrutiny to gender-based affirmative action plan).

strict scrutiny standard to affirmative action programs benefitting women that they now must apply to affirmative action programs benefitting minorities. Consequently, unless gender-based discrimination is subjected to strict scrutiny, the government may as a practical matter be more lenient in assessing its ability to adopt programs and policies which discriminate against women than it will be with respect to policies designed to overcome such discrimination. Such a miscarriage of justice has no place in this country's equal protection jurisprudence.

III. THE DECISION BELOW THREATENS THE EQUALITY OF WOMEN ACROSS THE COUNTRY

As this Court has observed repeatedly, the rights delineated in the Fourteenth Amendment are *individual* rights. *See, e.g., Adarand Constructors, Inc.* v. *Pena*, 63 U.S.L.W. 4523, 4530 (U.S. June 12, 1995) (reaffirming "the basic principle that the Fifth and Fourteenth Amendments protect *persons*, not *groups*") (emphasis in original); *Sweatt* v. *Painter*, 339 U.S. 629, 635 (1950); *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 351 (1938).

In the decision below, the Fourth Circuit set aside this core principle of equal protection law. Instead, it based its approval of the VWIL alternative on generalized (and stereotyped) notions of how most young women would respond to a VMI-type adversative environment.[5] Instead of recognizing (as did one of VMI's own expert witnesses) that many young women would benefit from a VMI-style education,[6] the court below justified the

[5] "Educational experts for the Commonwealth testified that women *may not* respond similarly and that if the state were to establish a women's VMI-type program, the program would attract an insufficient number of participants to make the program work." A. 27a (emphasis supplied).

[6] *See* A. 223a (testimony of Dr. Richard Richardson that "undoubtedly" there are women who will do well under an adversative model).

watered-down VWIL program by speculating that *other* women would want a less confrontational environment. In so doing, the lower court ignored the fact that the VMI program may be equally inappropriate for (and undesirable to) most male students.

In effect, the Fourth Circuit traded off the rights of individual women who want a VMI education against those of a hypothetical group of women who fit the court's stereotyped assumptions and who might prefer something different. The analytical question the lower court should have posed instead—and the one consistent with this court's individual-rights view of equal protection—is whether the State's refusal, solely on gender grounds, to provide a VMI education to qualified individual women who may want one is substantially related to an important government interest.

By setting aside the rights of individual women who desire a VMI education, the decision below invites the states to perpetuate and reinforce stereotypical conceptions of proper gender roles by providing specific benefits, whether educational or otherwise, only to those who fit the state's preferred stereotypes. Today Virginia seeks to provide rigorous, adversative, and prestigious military education to men, and genteel leadership training to women. In the telling phrase of the district court, Virginia will teach men to march "to the beat of a drum" and women "to the melody of a fife." A. 84a. Tomorrow, another state might decide to offer vocational training in construction to men and home economics to women; or to offer math classes to young boys and sewing classes to young girls. The unconstitutionality of such gender tracking is clear, whether or not the benefits of math and sewing classes are "substantively comparable." To foreclose the potential for mischief inherent in the Fourth Circuit's invidious standard, this Court should grant the petition, and reverse.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court to grant the petition for a writ of certiorari.

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Dated: June 26, 1995

APPENDIX

APPENDIX

The National Women's Law Center ("NWLC") is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of the Constitution and laws prohibiting discrimination. It has a deep and abiding interest in assuring the eradication of state-sponsored discrimination against women and girls in education.

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization of nearly 300,000 members which is dedicated to preserving the Bill of Rights. The ACLU Women's Rights Project, established in 1971, has been a leader in persuading courts to extend the protections of the Constitution to bring down the barriers to full equality for women in American society. The ACLU Women's Rights Project currently represents Shannon Richey Faulkner in her challenge to the all-male state military school, The Citadel of South Carolina. As counsel to Ms. Faulkner, the ACLU has a direct and profound interest in the outcome of the VMI litigation, and adds an invaluable perspective to this appeal as *amicus curiae*. The need for this Court's guidance on the proper application of intermediate scrutiny is perhaps nowhere better illustrated than by the turn of events in the Faulkner litigation, in which Ms. Faulkner must, under the Fourth Circuit's order, return to the trial court to litigate the constitutionality of segregated educational program under the cloud of the two unconstitutional standards concocted by the Fourth Circuit—both the "special" intermediate scrutiny and the "substantively comparable" tests.

The American Association of University Women's ("AAUW") 150,000 members work for education and

equity for women and girls. Since 1881, AAUW has advocated for equal education opportunities for students at every level.

B'nai B'rith Women (BBW) was founded in 1897 by a group of Jewish women who sought to improve the quality of life for women in their communities. Now an organization of 75,000 in the United States and Canada, BBW continues to speak out on issues that affect women —in their communities, families and in society. BBW supports civil rights laws that protect women and minorities; endorses equal pay for jobs of comparable worth; and advocates for adequate and just educational opportunities for all. BBW urges the Supreme Court to review the Fourth Circuit's decision in the VMI case.

The Center for Advancement of Public Policy is a non-profit, non-partisan organization working for equity for women, including educational equity for girls. For women to achieve equal status with men in American society, it is essential that girls receive equal educational opportunities. It is unconscionable that tax dollars are used to support gender-segregated educational institutions.

The Center for Women Policy Studies ("Center") was founded in 1972 as the first national policy research and advocacy institute focused exclusively on issues of social and economic justice for women. The Center conducts research and advocacy programs on sexual harassment and violence against women, work/family and "diversity" policies of employers, education, and other issues relevant to women.

The Coalition of Labor Union Women (CLUW), founded in 1974, is a national association of over 20,000 union members which advances the benefits of organized workplaces for women and promotes women's leadership development within the labor movement. CLUW is also an advocacy organization on behalf of millions of Ameri-

can working women, promoting affirmative action, leadership, health care reform, pay equity, child care options, and reproductive healt... The Coalition of Labor Union Women opposes discrimination against women in all forms.

The Connecticut Women's Education and Legal Fund ("CWELF") works through legal and public policy strategies and community education to end sex discrimination and empower all women to be full and equal participants in society. CWELF was founded in 1973 and has over 1,000 members. CWELF seeks to join this case as amicus curiae because it is integral to our mission to ensure equal educational and occupational opportunities for women.

Equal Rights Advocates (ERA) is a San Francisco-based public interest law center dedicated to the empowerment of women through the establishment of their economic, social and political equality. Since its inception over twenty years ago, ERA has specialized in litigating cases and pursuing public policy initiatives designed to assure women equal access to all of society's benefits including employment, education and public accommodations.

Federally Employed Women, Inc. ("FEW") is an international non-profit organization representing over one million civilian and military women employed by the Federal government. Since its inception in 1968, FEW's primary objective has been to eliminate sex discrimination and sexual harassment and enhance career opportunities for women in government. The Virginia Military Institute case is particularly of interest to FEW in that it denies young women the opportunity to receive quality military training and further perpetuates the notion that the military services can willfully and legally maintain policies and practices that are clearly discriminatory on the basis of gender.

The National Council of Jewish Women, Inc., ("NCJW") is a volunteer organization, inspired by Jewish values, that works through a program of research, education and advocacy and community service to improve the quality of life for women, children and families and strives to ensure individuals rights and freedoms for all. Founded in 1893, the NCJW has 100,000 members in over 500 communities around the country. The NCJW believes that "access to quality education is a fundamental right for all individuals." Based on NCJW's National Resolutions stating our belief that equality of rights shall not be denied or abridged on the basis of gender, we join this brief.

The National Council of Negro Women ("NCNW") is the nation's broadest based organization of African American women. A nonprofit voluntary service organization and 250 community based sections, NCNW has an outreach to cover four million women. Pursuant to NCNW's goal of providing greater opportunities for African American women, NCNW opposes sex discrimination in publicly funded universities such as the Virginia Military Institute.

The National Education Association ("NEA") is a nationwide employee organization with a current membership of 2.2 million members, the vast majority of whom are employed by public education institutions. NEA has long opposed gender discrimination in educational institutions.

The National Gay and Lesbian Task Force ("NGLTF") is a lesbian and gay civil rights organization dedicated to promoting freedom and full equality for all lesbians and gay men. NGLTF is proud to join this brief and all those individuals and organizations who challenge the Virginia Military Institute's discriminatory practice of prohibiting the admission of women to VMI.

The National Organization for Women ("NOW") is the largest feminist organization in the United States with

a membership of over 250,000 women and men and more than 750 chapters throughout the country. Since its founding in 1966, a major goal of NOW has been the eradication of sex discrimination in all aspects of education. NOW believes that until girls and women have equal access to all publicly funded educational institutions, and all of the programs therein, they are unlawfully denied the very basis of equal opportunity to compete and achieve in every aspect and level of U.S. society. In furthering its commitment to that goal, NOW has participated in numerous legal cases and worked for legislation and regulations to secure full enforcement of laws prohibiting sex discrimination in education.

The National Woman's Party, founded in 1913, is a historic, nonprofit, nonpartisan organization devoted to equality for women. In keeping with our historic commitment to equality for all people, the National Woman's Party strongly supports the inclusion of young women as full and equal participants at the Virginia Military Institute and joins the amicus brief in the VMI case.

The National Women's Conference Committee ("NWCC"), since its inception in 1977, has supported the grass roots movement for women's rights, as well as legal, economic, and social changes to ensure women's equality. With affiliated networks in 34 state capitals (including Virginia), the NWCC works to implement the 26-plank National Plan of Action for Women. The National Plan of Action, adopted by demographically representative delegates as part of the federally sponsored National Women's Conference, includes a plank supporting equal educational opportunity for women. In order to further the goal of equal educational opportunity, the NWCC opposes sex discrimination in publicly funded colleges and universities.

The National Women's Political Caucus ("NWPC") is a national grassroots organization that recruits, trains

and supports women for elected and appointed office at every level, regardless of party. NWPC traditionally convenes the Coalition of Women's Appointments which helps each national administration to find women for senior positions. The availability of qualified women for top appointed positions in military and defense areas depends in large measure on their access to the special training and education which prepares future leaders.

The NOW Legal Defense and Education Fund ("NOW LDEF") is one of the nation's foremost nonprofit advocacy organizations dedicated to the elimination of sex discrimination. Since its inception in 1970, the NOW LDEF has been involved in many federal and state cases concerning the issues of sexual harassment, education and women's rights. NOW LDEF is especially concerned with the issues raised in this case because of the importance of ensuring that women and girls receive non-discriminatory education under non-discriminatory conditions.

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm dedicated to using trial lawyers' skills and strategies to advance the public good. Supported by a nationwide network of over 1,500 of the country's outstanding trial attorneys, TLPJ has actively pursued numerous sex discrimination in education cases pursuant to Title IX of the Education Amendments of 1972.

Women Employed is a national organization of working women, based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination. Women Employed works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service and public education. Women Employed strongly believes that one of the most fundamental guarantees that women are entitled to under the equal protection of the law concerns educational opportunity.

The Women's Law Project ("WLP") is a non-profit, feminist legal advocacy organization located in Pennsylvania. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy advocacy and education. WLP believes that access to equal educational opportunities is essential to achieving equal rights for women, and has worked throughout its twenty-year history to eliminate sex discrimination in education.

The Women's Legal Defense Fund ("WLDF"), founded in 1971, is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. WLDF has been an active participant in virtually all major sex discrimination cases before the Supreme Court, in countless cases in the lower federal courts, in Congressional efforts to remedy sex discrimination and in nationwide education efforts to inform policymakers and others about sex discrimination.

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No. 94-1941

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

COMMONWEALTH OF VIRGINIA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether a State that provides a rigorous military-style public educational program for men can remedy the unconstitutional denial of the same opportunity to women by offering them a different type of single-sex educational program deemed more suited to the typical woman.

2. Whether coeducation is the required remedy in the context of this case.

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OPINIONS BELOW

The opinion of the court of appeals regarding remedy (Pet. App. 1a-52a) is reported at 44 F.3d 1229. The opinion of the district court regarding remedy (Pet. App. 53a-131a) is reported at 852 F. Supp. 471. The opinion of the court of appeals regarding liability (Pet. App. 134a-157a) is reported at 976 F.2d 890. The opinion of the district court regarding liability (Pet. App. 158a-245a) is reported at 766 F. Supp. 1407.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1995. The court of appeals voted sua sponte not to rehear the case en banc, and entered an order to that effect on April 28, 1995 (Pet. App. 246a-257a). On April 18, 1995, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 26, 1995. The petition

for a writ of certiorari was filed on May 26, 1995, and was granted on October 5, 1995 (116 S. Ct. 281). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

1. *The Virginia Military Institute.* The Virginia Military Institute (VMI) is a state military college in Lexington, Virginia. Since its founding in 1839, VMI has maintained a policy of admitting only men to its four-year undergraduate degree program. The fourteen other public colleges in Virginia are all coeducational. Approximately 1300 male students are enrolled at VMI. Pet. App. 137a-138a, 141a.

VMI's mission statement declares that VMI's goal is to produce "citizen-soldiers," described as "educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary." Pet. App. 6a, 139a. The VMI curriculum includes liberal arts, science and engineering courses, and VMI confers both Bachelor of Arts and Bachelor of Science degrees. *Id.* at 200a.

As the district court found, VMI has a strong reputation for producing leaders, and has an exceptionally loyal and powerful alumni network. Pet. App. 137a-138a. That network is "enormously influential," 94-1667 & 94-1717 (*VMI II*) Tr. 1227, especially in the male-dominated fields of engineering, the military, business, and public service in which VMI graduates tend to pursue careers, *id.* at 1228. "VMI alumni

overwhelmingly perceive that their VMI educational experience contributed to their obtaining personal goals." Pet. App. 205a. VMI enjoys the largest endowment on a per-student basis of any undergraduate institution in the United States. *Id.* at 130a.

VMI employs an "adversative" method of character development and leadership training not currently used by any other college-level institution. That method is based on techniques used in "English public schools" and "earlier military training," although it has long been abandoned at the United States military academies. Pet. App. 139a, 192a. The method "emphasizes physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of values." *Id.* at 139a; see *id.* at 191a-192a. "As a consequence of completing the rigorous tasks, succeeding, and actually graduating from VMI, VMI cadets have a sense of having overcome almost impossible physical and psychological odds. They have been put through great physical pressures and hazards, and just to have made it yields a feeling of tremendous accomplishment." *Id.* at 205a.

VMI's adversative method is implemented through a pervasive military-style system. Pet. App. 140a-141a, 191a-200a. The system includes the "rat line," which is a seven-month regimen during which first-year cadets, or "rats," are "treated miserably," like "the lowest animal on earth." *Id.* at 194a-195a.[1]

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[1] The term "rat line" derives from the prescribed route through the barracks that first-year cadets must traverse during most of the first year in a position of rigid attention. Gov't Exh. 73, at 17, Lodged Materials From The Record (referred to herein as L. __) at 268.

"Rats" are subjected to a strict system of punishments and rewards that creates "a sense of accomplishment and a bonding to their fellow sufferers and former tormentors." *Id.* at 194a. The "rat line" experience is accompanied by "rat training," "a tough physical training program" "designed to foster self-confidence and physical conditioning in fourth classmen [i.e., freshmen] by creating training situations which are stressful enough to show them that they are capable of doing tasks which surpass their previously self-imposed limits." *Id.* at. 195a; 91-1690 (*VMI I*) C.A. App. 1668 (L. 192).

The "class system" assigns roles to each class of cadets within a hierarchy in order to "cultivat[e] leadership." Pet. App. 196a. "After the rat line strips away cadets' old values and behaviors, the class system teaches and reinforces through peer pressure the values and behaviors that VMI exists to promote." *Ibid.* VMI's program also includes the "dyke system," an arrangement by which each "rat" is assigned a senior as a mentor to give some "relief from the extreme stress of the rat line." *Id.* at 196a-197a. VMI's honor code—providing that a cadet "does not lie, cheat, steal nor tolerate those who do"—provides "the single penalty of expulsion for its violation." *Id.* at 140a.

VMI requires cadets to "live within a military framework; they wear the cadet uniform at the Institute, eat most meals in the mess hall, live in a barracks, and regularly take part in parades and drills." *VMI I* C.A. App. 52. "[T]he most important aspects of the VMI educational experience occur in the barracks." Pet. App. 197a-198a. There, cadets live at close quarters with one another, three to five together in stark and unattractive rooms, with poor

ventilation, unappealing furniture, windowed doors with no locks and no window coverings. *Id.* at 199a. "[A] cadet is totally removed from his social background," and placed in an environment the principal object of which is "to induce stress." *Ibid.*

Although VMI has always restricted admission to men, some women "would want to attend [VMI] if they had the opportunity." Pet. App. 174a; see also *id.* at 231a, 232a (recruitment of women would likely yield a 10% female student body at VMI). Between 1988 and 1990 VMI received 347 letters from women inquiring about admission, or indicating interest in attending VMI. *Id.* at 229a; see Gov't Exhs. 104, 105 (*e.g.*, L. 156). It is not disputed that some women can succeed within the VMI-type methodology and are capable of doing all of the individual activities required of VMI cadets. Pet. App. 76a, 146a, 223a, 234a. The district court expressly found that the VMI methodology "could be used to educate women." *Id.* at 76a; see *id.* at 155a.

2. *The Liability Determination.* On March 1, 1990, the United States sued the Commonwealth of Virginia, the Governor of Virginia, VMI, its Superintendent and Board of Visitors, and others responsible for the operation of VMI and for coordination of Virginia's system of higher education, in the United States District Court for the Western District of Virginia. The suit was filed pursuant to 42 U.S.C. 2000c-6 in response to a complaint filed with the Attorney General by a female high school student seeking admission to VMI. The United States alleged that VMI's men-only admissions policy violated the Equal Protection Clause of the Fourteenth Amendment, and sought an order enjoining respondents from excluding women and from otherwise

discriminating on the basis of sex in the operation of VMI. Pet. App. 141a.

Neither the Governor nor the Commonwealth of Virginia participated at the liability phase in defending VMI's admissions policy.[2] The VMI Foundation and the VMI Alumni Association, both private organizations, intervened as defendants. Pet. App. 160a. They maintained that VMI's exclusion of women was substantially related to two "important governmental objectives": "educating cadets for lives as 'citizen-soldiers,'" R. 152 (VMI Defendants' Proposed Findings of Fact and Conclusions of Law (liability phase) (Apr. 26, 1991)), at 114 (¶ 28), and fostering "system-wide diversity by providing an opportunity for single-sex education and by providing a distinctive program of military-style education," *id.* at 115 (¶ 38).

On June 14, 1991, the district court entered judgment in favor of respondents. Pet. App. 158a-245a. It held that the exclusion of women was substantially related to respondents' asserted important state interests because "[t]he single-sex status would be lost, and some aspects of the distinctive method would be altered if it were to admit women." *Id.* at 173a.

On appeal, a panel of the Fourth Circuit held that VMI's admissions policy violated the Equal Protection Clause and remanded to the district court for remedial proceedings. Pet. App. 134a-156a (*VMI I*). The court concluded that the Commonwealth "failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type

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[2] The then-Governor took the position that no person should be denied admission to a state college on account of sex. Pet. App. 142a; see also Answer at ¶¶ 15-16 (L. 7-8); *VMI I* C.A. App. 131-132 (L. 22-23).

education to men and not to women." *Id.* at 155a. Noting that the only policy statement in the record "in which the Commonwealth has expressed itself with respect to gender distinctions" required that its colleges and universities treat students "*without regard to sex, race, or ethnic origin*," *id.* at 153a (emphasis added by court of appeals), the court rejected the district court's conclusion that Virginia has a policy of providing single-sex education to promote a diverse array of options, *id.* at 152a-153a. Moreover, "[i]f VMI's male-only admissions policy is in furtherance of a state policy of 'diversity,' the explanation of how the policy is furthered by affording a unique educational benefit only to males is lacking." *Id.* at 153a-154a.

The court of appeals then concluded that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women." Pet. App. 155a. Admission of women, however, would lead to some changes at VMI. The court therefore declined, "[i]n light of * * * the generally recognized benefit that VMI provides," to "order that women be admitted to VMI if alternatives are available." *Ibid.* The case was remanded to the district court "to give to the Commonwealth the responsibility to select a course it chooses, so long as the guarantees of the Fourteenth Amendment are satisfied":

> [T]he Commonwealth might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private

> institution. While it is not ours to determine, there might be other more creative options or combinations.

Id. at 156a.

This Court denied certiorari. *VMI* v. *United States*, 113 S. Ct. 2431 (1993). Pet. App. 132a-133a.

3. *The Virginia Women's Institute for Leadership Remedial Plan.* On remand, respondents proposed as a remedy the reservation of VMI exclusively for men, and, for women, the creation of a women-only Virginia Women's Institute for Leadership (VWIL), a separate program to be located on the campus of Mary Baldwin College, a private women's liberal arts college located 35 miles from VMI. Pet. App. 8a. That program, reflecting respondents' views of "the differences and the needs of college-age men and women," *id.* at 62a, would be based on "a cooperative method which reinforces self-esteem rather than the leveling process used by VMI," *id.* at 63a-64a. The program would be "equivalent to a [curricular] minor, that would explore various aspects of women's leadership." Gov't Exh. 52, at 1 (L. 248).

The program was developed by a Task Force selected by respondents and composed entirely of faculty and administrators at Mary Baldwin. VWIL would be consistent with Mary Baldwin's "historical mission" because "we couldn't insert into Mary Baldwin something that would be VMI but would not be Mary Baldwin." *VMI II* C.A. App. 436 (testimony of Dean of Mary Baldwin College). The Task Force did not consult anyone at VMI in planning the curriculum; the president of Mary Baldwin stated that "[w]e are the experts on educating women." *Id.* at 418. VWIL would be funded by the Commonwealth and the VMI

Board of Visitors, and would be anticipated to have about 25-30 students in its first year. Pet. App. 10a.

The Task Force adopted for VWIL the VMI mission of producing "citizen-soldiers," Pet. App. 8a,[3] but it rejected every component of VMI's system. Finding that "[y]oung women will be for the foreseeable future products of a culture which encourages them to find their sense of self in relationships," *VMI II* C.A. App. 255 (L. 329), the Task Force "determined that a military model and, especially VMI's adversative method, would be wholly inappropriate for educating and training most women for leadership roles." Pet. App. 63a.[4]

The Task Force rejected VMI's military lifestyle for VWIL. *VMI II* C.A. App. 471-472.[5] VWIL would

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[3] VWIL's mission statement, however, omits the VMI mission statement's commitment to producing graduates who are "advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril." Pet. App. 202a.

[4] One Task Force member, the Dean of Students at Mary Baldwin, relied on her experience as a sorority advisor to conclude that women would not benefit from VMI training. *VMI II* C.A. App. 591. She observed that, while young men "will paddle their pledges," "make them consume alcohol" and "eat disgusting things," young women "will give flowers [and] write poems." *Id.* at 599. She had "never met a young woman who would seek out a program like" VMI's. *Id.* at 598-599. Another Task Force member, the Dean of Mary Baldwin, stated that VMI's adversative training method would have a parallel in a different adversary for the women of VWIL: For the young woman, "[p]erhaps the adversary is herself and her sense that she's never been expected to do this before." *Id.* at 459.

[5] A mailing Mary Baldwin College sent to alumnae and friends of the college posed the question "Is Mary Baldwin going to turn into a military school?" and answered "No! Mary

provide no military framework or training other than the Mary Baldwin ROTC program, involving two hours of training per week for freshman and sophomores and four hours per week for juniors and seniors. Pet. App. 109a-111a.[6] VWIL students would also participate in a newly established, largely ceremonial Virginia Corps of Cadets. *Id.* at 9a, 110a. VWIL students would not wear uniforms except when participating in ROTC or Virginia Corps of Cadets activities. *Id.* at 111a. VWIL students would participate in a leadership externship, keep a journal, participate in organizing a speaker series, and organize and carry out community projects. *Id.* at 9a. When the President of Mary Baldwin presented the VWIL concept to the college faculty, the discussion about possibly having military marching and parades on the campus "was fraught with humor." *VMI II* C.A. App. 482-483. In contrast with "the entirely militaristic experience of VMI," "VWIL * * * incorporates the element of public service." Pet. App. 68a; see also *VMI II* C.A. App. 464.

Instead of the "rat line," VWIL would have "training in self-defense and self-assertiveness through a Cooperative Confidence Building program." Pet. App. 111a-112a. Residential life for VWIL students would also "vary significantly" from VMI. *Id.* at 66a. There would be no barracks at VWIL. VWIL students would

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Baldwin will retain its identity, daily life on campus would not be any different." *VMI II* C.A. App. 633.

[6] When VWIL was planned, only one Mary Baldwin student was participating in ROTC. No Mary Baldwin student had been commissioned in the preceding three years. *VMI II* C.A. App. 640.

live in Mary Baldwin student housing, in which privacy would be respected. *Id.* at 127a-128a.[7] VWIL freshman students would room together in separate sections of the Mary Baldwin residence halls "to facilitate the development of group identity while also encouraging good relationships and friendships with other freshmen." *Id.* at 114a. "VWIL participants will be encouraged to participate in MBC activities and class functions." *Id.* at 114a-115a. VWIL students would not be required to eat meals together. *Id.* at 111a. VWIL would not use class or dyke systems, but instead would have a mentoring requirement. *VMI II* C.A. App. 460, 894-895. VWIL also would also not use VMI's expulsion-only honor code. Pet. App. 114a-115a.

Mary Baldwin College does not have a math and science focus and does not offer a Bachelor of Science degree. Pet. App. 131a. Its faculty "hold[s] significantly fewer Ph.D.'s than the faculty at VMI," *id.* at 129a, and receives significantly lower salaries, *VMI II* C.A. App. 493. The physical training facilities at Mary Baldwin are far less extensive and sophisticated than those at VMI. Pet. App. 130a-131a.

4. *The Remedial Decisions Below.* The district court approved VMI's proposed remedial plan. Pet. App. 53a-131a. The court acknowledged that the proposed VWIL "differs substantially from the VMI program," *id.* at 55a; see *id.* at 12a, 67a-68a, but found

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[7] Mary Baldwin student dorms include a "wide range of living arrangements," such as "[r]esidence halls * * * elegantly equipped with brass chandeliers, plush carpeting and mahogany furniture." Pet. App. 127a. Many are converted single-family homes, furnished by the college, and each with "its own distinct character." *Ibid.* Some have "televisions, cable hook-ups and microwave ovens." *Ibid.*

the differences to be "justified pedagogically" based on "developmental and emotional differences between the sexes." *Id.* at 72a, 76a; see *id.* at 62a. The court accepted the conclusions of the Task Force that "a military model and, especially VMI's adversative method, would be wholly inappropriate for educating and training most women for leadership roles," *id.* at 63a, and found VWIL's cooperative confidence building method to be more appropriate for "the different educational needs of most women," *id.* at 10a.

The court concluded that the adversative method was "inappropriate for most women" because "most women reaching college generally have less confidence than men." Pet. App. 64a. Young women therefore "do not need to have uppityness and aggression beaten out of them." *Id.* at 73a-74a. Whereas "the VMI model is based on the premise that young men come with [an] inflated sense of self-efficacy that must [be] knocked down and rebuilt," "[w]hat [women] need is a system that builds their sense of self-efficacy through meeting challenges, developing self-discipline, meeting rigor and dealing with it, and having successes." *Id.* at 10a-11a. "[T]he 'nature of an experience that is growth-producing for a majority of women, according to the literature, is one that is supportive, is one that emphasizes positive motivation.'" *Id.* at 223a. See generally pages 37-40, *infra*. Based on those notions of "what women need," the court predicted that VWIL's method "will produce the same or similar outcome for women that VMI produces for men." Pet. App. 64a; see *id.* at 75a-76a. The court concluded that "[i]f VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination." *Id.* at 84a.

The court of appeals affirmed, Pet. App. 1a-30a (*VMI II*), with Judge Phillips dissenting, *id.* at 31a-52a. The panel majority devised a new "special intermediate scrutiny test" with which to review the constitutionality of VMI's proposed remedy. It interpreted this Court's decision in *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982),[8] to require only:

1. that the governmental objective be "consistent with a legitimate governmental role" and "not pernicious," *id.* at 14a, 16a, 22a; and

2. that the sex-based classification be "important in serving" that objective, *id.* at 14a-15a, 16a.

In the court's view, Virginia's asserted objective of "providing the option of a single-gender college education," *id.* at 20a, sufficed to meet that test, and the challenged exclusion of women from VMI was "by definition necessary for accomplishing th[at] objective," *id.* at 16a.

Recognizing that, without more, its analysis would provide "little or no scrutiny" of single-sex educational programs, the court then added a new "third step," applicable to cases in which the State's objec-

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[8] The intermediate-scrutiny equal-protection test for sex-based classifications set forth in *Hogan*, 458 U.S. at 724, requires an "exceedingly persuasive justification" for excluding members of one sex from an institution of higher education. "Th[at] burden is met only by showing at least [1] that the classification serves important governmental objectives and [2] that the discriminatory means employed are substantially related to the achievement of those objectives." *Ibid.* (internal quotation marks omitted).

tive is to achieve "homogeneity of gender" in separate educational programs. Pet. App. 16a-18a. Under that third step:

> 3. The benefits provided to each sex through separate programs must be "substantively comparable." *Id.* at 17a.[9]

The court then concluded that VWIL would be substantively comparable to VMI, because

> both VMI and VWIL * * * seek to teach discipline and prepare students for leadership. The missions are similar and the goals are the same. The mechanisms for achieving the goals differ—VMI utilizing an adversative and pervasive military regimen and VWIL proposing to utilize a structured environment reinforced by some military training and a concentration on leadership development—but the difference is attributable to a professional judgment of how best to produce the same opportunity.

Id. at 26a.

In approving the continued exclusion of women from VMI, the court reasoned that, "[i]f we were to place men and women into the adversative relationship inherent in the VMI program, we would destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes." Pet. App. 23a. The

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[9] The court emphasized that it was not requiring "separate but equal," Pet. App. at 18 n.*, nor that the programs be "the same," *id.* at 17a, because "equal methods and equal results" are not required for "different classes of people," and any suggestion to the contrary "is justified only by a needless, and indeed baseless, demand for conformity," *id.* at 25a.

court acknowledged that the VWIL degree will lack the historical benefit and prestige of a VMI degree, but stated that those intangible benefits "must be the byproduct of a longer-term effort." *Id.* at 27a.

The Fourth Circuit voted, sua sponte, not to reconsider the case en banc. Pet. App. 246a-250a. Judge Motz wrote an opinion dissenting from that decision, in which Judges Murnaghan, Michael, and Hall joined. *Id.* at 251a-257a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since its founding in 1839, the Virginia Military Institute has not admitted women. That practice has correctly been held to violate the Equal Protection Clause, and the question before the court in this case is how that violation should be remedied. Respondents have argued that the value to men of a men-only VMI is an absolute barrier to women's admission. The remedy they chose continues to maintain VMI exclusively for men, and offers an alternative for women that is admittedly separate, different, and unequal. They defend that plan on the basis of harmful sex-role stereotypes, and continue to resist the determination of liability. The program for women that they sponsored—itself a constitutionally inadequate remedy—in their view provides women *more* than they constitutionally deserve.

Women are entitled to equal access to all the benefits that VMI seeks to provide exclusively to men. Women who, but for their sex, are qualified for VMI and want to go to VMI are entitled to an equal opportunity to attend the program they find more valuable; they cannot be relegated to a separate and substantially different education. The only adequate redress for women's unconstitutional exclusion from

VMI is to order that VMI's men-only admissions policy be ended.

I. A. Traditional remedial principles demand a remedy that closely fits the violation. Once a constitutional violation is identified, the court's remedial order must eradicate, to the greatest extent possible, the harm caused by the unconstitutional conduct. Application of that principle makes it evident that an order enjoining VMI's men-only admission policy is the only adequate remedy in this case, and that the remedy approved by the court of appeals falls far short of the goal of providing complete relief.

VMI's men-only admissions policy has caused and continues to cause—both tangible and intangible harms. It has deprived women of the VMI educational experience, which is unlike the experience at any other college in Virginia. VMI has an intensive, highly structured military-style educational program that challenges students to achieve more than they might otherwise have accomplished, and that has been remarkably successful in producing leaders in male-dominated careers. Women barred from VMI are also excluded from membership in the circle of VMI's powerful alumni and from the particular prestige carried by a VMI degree. Finally, VMI's admissions policy has communicated a message that, in the eyes of the Commonwealth, women do not possess the qualities of self-discipline, ability to withstand stress, and respect for hierarchy that are widely associated with VMI. The only way to offer women the benefits of VMI, and to cure the stigma imposed on women by their historical exclusion, is to prohibit its men-only admissions policy.

B. The court of appeals viewed the prospect of women's admission to VMI as presenting a "Catch

22" for women, because, in its view, women's admission would "destroy" the very opportunity women seek to share. Under that theory, respondents' interest in preserving VMI's benefits exclusively for men outweighs women's right to equal treatment. That theory is, not surprisingly, completely without support in modern equal protection doctrine. Preserving a benefit for one sex is not an adequate reason for denying it to the other; sex discrimination is not self-justifying.

Respondents have not, in any event, shown that integration of women at VMI would be impossible, or even that the changes that might be required at VMI when women are admitted would have a substantial or significant negative impact on the character or the effectiveness of VMI's educational program. Accommodations necessary to preserve privacy or account for physical differences would not change the fundamental nature of the program. The court of appeals' concern that the "decency that still permeates the relationship between the sexes" would suffer as a result of women's admission to VMI is constitutionally invalid; it is another example in a long history of official discriminations against and exclusions of women in the name of protecting them. The experience of coeducation at the federal military service academies also shows that the admission of women into a rigorous, military-style educational program does not impair any governmental interest in producing military personnel, let alone "citizen-soldiers."

II. A. The court of appeals approved a remedy that is itself unconstitutional. It would be appropriate for the Court to review that remedy under strict scrutiny, because differences in treatment based solely on

sex are inherently suspect. The long history of discrimination against women, the general irrelevance of sex as a ground for official decision-making, and women's continuing underrepresentation in government, all support the application of strict scrutiny here.

B. The constitutional violation in this case is, however, plain even under intermediate scrutiny. The approved remedy was designed, defended, and approved through the use of impermissible sex-stereotypes and overgeneralizations about the capacities and aspirations of "most" men and "most" women. Equal protection precludes reliance on such stereotypes and generalizations to foreclose individual opportunity. The inequality of treatment caused by the substantial differences between the sex-segregated VMI and VWIL programs is invalid under intermediate scrutiny.

Respondents' asserted interest in providing single-sex education cannot support the VWIL remedy. Respondents have shown no real interest in providing single-sex education, but have asserted it post hoc, in order to reserve VMI for men only. An interest in providing single-sex education would, in any event, not validate a program that offers substantially different programs and benefits to men and women and that bases those differences on invalid assumptions about the limited abilities of women.

ARGUMENT

Respondents violated the Equal Protection Clause by excluding women from VMI solely on the basis of their sex. The unconstitutionality of that practice was clear. This Court held in *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982), that a

State cannot prohibit enrollment in a state institution of higher education on the basis of sex without an "exceedingly persuasive justification" for doing so. The court of appeals in *VMI I* correctly held that Virginia "failed to articulate an important objective which supports the provision of [VMI's] unique educational opportunity to men only." Pet. App. 137a.

The court of appeals erred, however, in its remedial analysis. The only adequate remedy in this case is for VMI to stop excluding women from its student body on the basis of their sex. VMI's men-only admissions policy was unconstitutional because it excluded all women regardless of their individual abilities and characteristics. The remedy necessary to end that harm is an admissions policy based on individual qualifications and not on sex. When the women-only policy at the Mississippi University for Women was held to violate equal protection, qualified men were required to be admitted. *Hogan*, *supra*. When the men-only admissions policy at the University of Virginia was invalidated for the same reasons, qualified women were required to be admitted. *Kirstein* v. *Rector and Visitors of Univ. of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970). And when exclusion of girls from Philadelphia's Central High School was found to violate equal protection, qualified girls were required to be admitted. *Newberg* v. *Board of Pub. Educ.*, 478 A.2d 1352 (Pa. Super. Ct. 1984).[10] Women

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[10] *Newberg* was decided under both the Equal Protection Clause to the United States Constitution and the Equal Rights Amendment to the Pennsylvania Constitution, Pa. Const. Art. I, § 28. The same remedial principles apply to violations of either provision.

who, but for their sex, meet VMI's admissions standards must likewise be admitted to VMI.

The court of appeals in *VMI I* erred when it suggested that "parallel" single-sex programs might be an adequate remedy for VMI's unconstitutional exclusion of women. Point I below demonstrates that, in view of the distinctiveness of VMI's educational program, VMI's powerful prestige, exceptionally strong alumni support, and the harmful message about the different capabilities of men and women created by VMI's long-standing exclusion of women, a new, wholly separate school for women cannot possibly be an adequate remedy for the constitutional violation in this case. Predictably, the separate VWIL program is not. Point II demonstrates that reserving VMI for men only, while creating a separate and substantially different program for women at Mary Baldwin College, is itself unconstitutional. The separate VWIL program cannot, for that additional reason, be a remedy for the exclusion of women from VMI.

I. INVALIDATING VMI'S MEN-ONLY ADMISSIONS POLICY IS THE ONLY ADEQUATE REMEDY FOR THE CONSTITUTIONAL VIOLATION IN THIS CASE

A. Allowing Qualified Women To Attend VMI Is The Relief That Will Most Fully Remedy The Constitutional Violation

Remedial principles require a close fit between the constitutional violation and the remedy. The remedy "must be designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken* v. *Bradley*, 433 U.S. 267, 280 (1977) (internal

quotation marks omitted). "[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965); see also *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

Where persons have been unconstitutionally excluded from an institution in violation of equal protection, removing the exclusionary bar should be the presumptive remedy. That is true both because the tangible and intangible benefits offered at separate institutions are likely to differ (thus perpetuating the unequal treatment), and because reservation of any institution to males is "likely to be a witting or unwitting device for preserving tacit assumptions of male superiority."[11] Moreover, where the State's purposes are "as well served by a gender-neutral classification"—here, by a sex-neutral admissions policy—"as one that gender classifies and therefore carries with it the baggage of sex-stereotypes, the State cannot be permitted to classify on the basis of sex." *Orr* v. *Orr*, 440 U.S. 268, 283 (1979). As the Court emphasized in *Orr*, "this is doubly so where the choice made by the State appears to redound * * * to the benefit of those without need for special solicitude." *Ibid.* Maintaining VMI's current admissions policy will benefit only men, will continue to foster negative stereotypes, and denies women the complete remedy that admission to VMI would provide.

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[11] C. Jencks & D. Riesman, *The Academic Revolution* 297-298 (1968).

1. *Allowing qualified women to attend VMI is the only way to assure them equal access to VMI's unique attributes*

Women who have been barred from VMI have been denied the opportunity to experience its distinctive educational method, and have been foreclosed from the career possibilities and other "intangible" life-long benefits associated with attending and graduating from VMI. Both courts below recognized that fact. See Pet. App. 152a (court of appeals) (Virginia fails to offer women "the unique benefit of VMI's type of education and training"); *id.* at 192a (district court) ("women have no opportunity anywhere to gain the benefits of [VMI's] education"); see also *id.* at 218a. The only remedy that can provide women the equal opportunity they have been denied is admission to VMI. The leadership program at Mary Baldwin, which would be "equivalent to a [curricular] minor," Gov't Exh. 52, at 1 (L. 248), does not come close to matching the comprehensive VMI program from which women have been excluded. Given VMI's distinctive benefits, a separate program, however designed, could not possibly provide an adequate remedy.

As the district court found, a new program at a separate, all-female institution also cannot "supply those intangible qualities of history, reputation, tradition, and prestige that VMI has amassed over the years." Pet. App. 60a-61a. VMI's own expert compared VMI and its traditions to "English cathedrals," that were "built over a period of 150 years." *VMI I* C.A. App. 1249. VMI's students and graduates enjoy the benefits of association with an established and renowned institution with a distinctive reputation.

VMI has one of the oldest alumni organizations in the country, and its alumni network is "exceptionally close to the school." Pet. App. 192a. "Those who survive the [VMI] experience are forever set apart in their own minds and those of their colleagues as a special breed. * * * It is clearly an advantage to * * * be part of such a network." *VMI I* C.A. App. 1750 (L. 218). The alumni network is "enormously influential," *VMI II* Tr. 1227, especially in the historically male-dominated fields of engineering, the military, business, and public service in which VMI graduates tend to pursue careers, *id.* at 1228. See also *VMI II*, Pet. App. 50a-51a (Phillips, J., dissenting). Respondents have consistently asserted that VMI alumni disproportionately serve in military leadership positions, see R. 152, at 12 (¶ 62), and disproportionately achieve influential and lucrative positions in public and private life, *id.* at 17 (¶ 87); see also *VMI II* Tr. 1228-1231. In *Sweatt* v. *Painter*, 339 U.S. 629 (1950), this Court deemed such intangible qualities to be "more important" than tangible resources when comparing the quality of separate educational institutions. *Id.* at 634. In so holding, the Court emphasized "those qualities which are incapable of objective measurement but which make for greatness in a * * * school." *Ibid.* Such qualities included "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." *Ibid.* A new and separate program for women cannot possibly match VMI in those enormously important respects.

2. *Allowing qualified women to attend VMI is the only way to cure the state-sponsored sex stereotyping and stigma resulting from VMI's exclusionary policy*

VMI stands as an official monument to the discredited view that women are categorically different from, and in many respects inferior to, men. VMI's men-only admissions policy is a relic of an era when women were generally considered unfit for higher education of any type, and especially unfit for leadership or military service. VMI celebrates the fact that its male tradition harks back to that "time when society expected men to achieve adult status through experiences that differed from those considered appropriate for women." *VMI I* C.A. App. 1752 (L. 220).[12] The continued exclusion of women from VMI thus imparts the impermissible message that, as a matter of official policy, Virginia continues to believe that women are not suited for rigorous military training, or for military service or other leadership positions that require such training. In that respect, women's continued exclusion from VMI is "practi-

[12] VMI's men-only admissions policy was adopted when it opened in 1839, and the school's current mission "was established early in the life of the institution." Pet. App. 214a. Women at that time were "academically disenfranchised." *Hogan*, 458 U.S. at 727 n.13. In the early 19th century, there was "great resistance towards the idea of providing higher education for women, because it was believed that they were mentally and physically inferior to men and therefore unable to attend class on a regular basis." United States Commission on Civil Rights, *More Hurdles to Clear* (1980) (Clearinghouse Publication No. 63), reprinted in *Yellow Springs Exempted Village School Dist. Bd. of Educ.* v. *Ohio High School Athletic Ass'n*, 647 F.2d 651, 670 (6th Cir. 1981).

cally a brand upon them, affixed by law, an assertion of their inferiority" that "denigrates the dignity" of the excluded women, and "reinvokes a history of exclusion." *J.E.B.* v. *Alabama ex rel T.B.*, 114 S. Ct. 1419, 1428 (1994) (quoting *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1880); see also *Roberts* v. *United States Jaycees*, 468 U.S. 609, 625 (1984) (referring to "stigmatizing injury" caused by private club's exclusion of women).

VMI's admissions policy conveys the message that, while men can surmount their limitations and exceed their expectations, for women, biology truly is destiny.[13] When government thus inflexibly prejudges individuals' capabilities based on their sex, it announces that, in the eyes of the State, men and women are not truly equal. The only remedy that can counteract that message is to consider women eligible for admission to VMI.

B. Respondents Failed To Show That It Would Be Impossible To Admit Women To VMI

Respondents argued below that, "[i]f women were admitted to VMI, the whole program would col-

[13] The district court found that VMI had substantial transformative potential: "VMI takes students that are average from an academic perspective and, through the character development program, graduates people who have more than average commitment and motivation as well as character." Pet. App. 206a. VMI accepts all qualified Virginia applicants. Gov't Exh. 75, at 32 (L. 148). The minimum combined SAT score for admission to VMI is 700, *VMI I* C.A. App. 425, and the average score of men admitted to VMI is 1053, *id.* at 1789 (L. 234). Matriculants must meet the national ROTC fitness standard, but they are not required to be particularly athletic. Yet even women with superior academic and athletic ability are barred from competing alongside men at VMI.

lapse."[14] In response, the court of appeals "did not direct the Commonwealth of Virginia to change VMI to a coeducational college," Pet. App. 7a, because women's admission to VMI might create a "Catch 22," whereby "the change caused by [women's] admission would destroy the opportunity," *ibid.* (quoting *VMI I*, *id.* at 148a).

Because of the strong presumption that admission of women to VMI is the correct remedy in this case, respondents face the heaviest burden of justification in not adopting that remedy. A desire to maintain the benefits of VMI in their current form exclusively for men clearly is not such a rationale:

> Since any gender-based classification provides one class a benefit or choice not available to the other class, * * * that argument begs the question. The issue is not whether the benefitted class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.

Hogan, 458 U.S. at 731 n.17.[15] Nor is the tautology that women, if admitted, could not partake of the

[14] R. 152, at 48 (¶ 270).

[15] The preservation of advantages for a favored class of beneficiaries is obviously not a valid reason for excluding others. See, *e.g.*, *Cooper* v. *Aaron*, 358 U.S. 1, 13 (1958) ("adverse effect upon the educational program" is insufficient reason to delay school desegregation); *Buchanan* v. *Warley*, 245 U.S. 60, 82 (1917) (assertion that "acquisitions [of houses] by colored persons [would] depreciate property owned in the neighborhood by white persons" cannot justify racial exclusion); *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985) ("[T]he city may not avoid the strictures of [the Equal Protection Clause] by deferring to the wishes or objections of some fraction of the body politic" to support ordinance with exclusionary effect on disabled persons.).

special ethos of a men-only institution. VMI's mission of educating "citizen-soldiers" also plainly does not require that women continue to be excluded. See, *e.g.*, Pet. App. 254a-255a (opinion of Motz, J., dissenting from denial of rehearing en banc). Indeed, respondents have repeatedly asserted that citizen-soldiers are successfully produced elsewhere in Virginia, and would be at VWIL.[16]

1. *The admission of women would not "destroy" VMI*

The court of appeals discussed three areas in which the admission of women would require changes at VMI—"physical training, the absence of privacy, and the adversative approach." Pet. App. 147a-148a. Respondents have not demonstrated that any of the changes that might be necessary in those areas justifies continued exclusion of women from VMI.

a. *Privacy.* If women were admitted to VMI, "[a]llowance for personal privacy would have to be made." Pet. App. 171a. Respondents have not shown, however, that affording members of each sex privacy from members of the other sex for sleeping, and for those few minutes each day required for personal hygiene and changing clothes, would materially interfere with VMI's practice of providing cadets with a minimum of privacy. All cadets could continue to lack privacy vis-a-vis their own gender when sleeping,

[16] See, *e.g.*, R. 152, at 97 (¶ 536) (referring to "other state institutions that produce citizen-soldiers").

dressing and using the bathroom. And at all other times, individuals of both sexes could be subjected to close scrutiny by the entire group. Thus, if VMI so chose, men could continue (as at present) to lack privacy from other men, and women could lack privacy from other women.

b. *Physical training standards.* The court of appeals relied on evidence regarding strength differences between men and women to support its conclusion that admission of women would materially alter VMI. Pet. App. 147a-148a. It is conceded, however, that some—indeed many—women are able to meet VMI's current physical standards.[17]

In addition, the various physical challenges that VMI provides are not ends in themselves. They are part of the means of "adversative" training, designed to "creat[e] training situations which are stressful enough to show [the students] that they are capable of doing tasks which surpass their previously self-imposed mental and physical limits." *VMI I* C.A. App. 1668 (L. 192). There are a number of well-known methods for dealing with variations of physical ability within a student or similar population. Certain tasks can be adjusted according to sex-neutral ability

[17] The district court found that "some women are capable of all of the individual activities required of VMI cadets," Pet. App. 170a, including all the rat line tasks, the current physical training drills, and the VMI physical fitness test. *Id.* at 233a-234a; see also *id.* at 234a ("15% of females in the applicant pool could successfully meet the requirements of the current VMI physical fitness test"); and see respondents' witness's testimony in *VMI I* C.A. App. 357-358 (regarding physical training and military drill, "we probably could have women come in here and many of them probably could do some of these things, or maybe all of them").

groupings based on persons' size, strength or experience, or limited accommodations can be made in response to physical differences between women and men. VMI has completely failed to show that it cannot use one or more such methods when women are admitted, nor has it identified any interest that would justify its failure to make an accommodation.

Indeed, VMI already makes accommodations for many of its male cadets. Those who participate in NCAA sports, including less strenuous sports such as golf, see *VMI I* C.A. App. 1658 (L. 182), are excused from "rat training" while practicing their sport. Pet. App. 195a. In addition, many current male VMI cadets fall short of VMI's physical fitness standards. VMI cadets take a physical fitness test each semester, consisting of a set of calisthenics and a timed 1.5-mile run. L. 285-288. Almost 50% of new cadets fail the test and are offered remedial training. *VMI I* C.A. App. 564-565. Some male students graduate from VMI still unable to pass the fitness test. *Ibid.* Admitting women to VMI would not for the first time introduce physical disparities among cadets; they already exist.

c. *The adversative approach and "decency between the sexes."* The court of appeals rejected the prospect of women participating with men in adversative training because it would "destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes." Pet. App. 23a. "[G]rating egos and setting the aggressiveness of one person against another through conflict, egalitarianism, lack of privacy, and stress" is, the court believed, inappropriate in an environment in which both women and men are present. *Ibid.*

That view is an impermissible basis for decision in this case. The conclusion that it is unseemly for men to behave in a harsh and disciplinary way toward women, or for women to do so toward men, reflects a "romantic paternalism" that cannot constitute a legitimate—let alone an important—state interest.[18] Women in the United States engage every day in activities that may require harsh "cross-gender confrontation." They arrest disobedient suspects, command emergency medical teams, cross-examine recalcitrant male witnesses, discipline rowdy youths, and serve as drill sergeants in the armed forces. The idea that women cannot—or should not—engage with men in activities that require aggression and "grating egos" is just as unacceptable as a justification for a State barring women from a renowned leadership educational program as it would be for a state to prohibit their participation in any other educational program or profession.

[18] The unconstitutional exclusion of women from jury service was similarly historically based on States' asserted interests in protecting women from "ugliness and depravity" and experiences that would "prove humiliating, embarrassing and degrading to a lady," or because "[r]everence for all womanhood would suffer in the public spectacle of women . . . so engaged." *J.E.B.*, 114 S. Ct. at 1423; see also *Goesaert* v. *Cleary*, 335 U.S. 464, 466 (1948) (upholding law prohibiting women from obtaining bartenders' licenses except to work in bars owned by their husbands or fathers based on the "moral and social problems" predicted if women independently tended bar); *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130, 141, 142 (1873) (Bradley, J., concurring in the judgment).

2. The example of the federal military service academies

The experience of the federal military academies in admitting women also shows that citizen-soldiers can be trained in a coeducational environment without "destroying" the institution.[19] The district court acknowledged that "the introduction of women did not significantly change West Point," Pet. App. 209a,[20] and that "[n]othing has changed at the [Naval] Academy [since the admission of women] except some physical training requirements and some facilities," *id.* at 210a.[21] At West Point, "women perform and

[19] On October 7, 1975, President Gerald Ford signed Public Law 94-106, § 803, 89 Stat. 537-538 (codified at 10 U.S.C. 4342 note), requiring the Military, Naval, and Air Force Academies (located at West Point, Annapolis, and Colorado Springs) to admit women as cadets starting in 1976. The law provides that "the academic and other relevant standards required for appointment, admission, training, graduation, and commissioning of female individuals shall be the same as those required for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals." 10 U.S.C. 4342 note. Congress enacted a similar provision for integration of women into the Coast Guard Academy, see Public Law 94-572, § 1, 90 Stat. 2708 (codified at 14 U.S.C. 182(a)), and regulatory authorization opened the way for women's admission to the Merchant Marine Academy starting in 1974. 46 C.F.R. 310.53 (1974).

[20] See generally Pet. App. 208a-209a (quoting Gov't Exh. 68).

[21] A VMI committee that studied the feasibility of coeducation at VMI reported in 1986 that the Naval Academy's coed plebe indoctrination system "imparts stress and pressure for the entire first year," and "[w]omen are totally integrated into the entering class except for the obstacle course and some of the physical aptitude exercises." Pet. App. 210a

compete as well as men in cadet basic training, cadet field training, and cadet advanced training," *id.* at 209a, and at Annapolis "[m]ale and female midshipmen do equally well," *id.* at 210a.[22] In 1984, a woman graduated first in her class at Annapolis. Gov't Exh. 67, at 7 (L. 109). In 1989, a female cadet attained the position of First Captain of the Corps of Cadets, the highest ranking position a cadet can hold at West Point, commanding approximately 4200 cadets. *VMI I* C.A. App. 738-739; General Accounting Office, *Report to Congressional Requesters, Military Academy: Gender and Racial Disparities* 10 (1994).

In sum, as the court of appeals' own remand order in *VMI I* recognized, enjoining VMI from continuing to use a men-only admissions policy is a feasible remedy; it is the only remedy that satisfies the constitutional command of equal treatment of women.

II. THE ESTABLISHMENT OF A WOMEN-ONLY LEADERSHIP TRAINING PROGRAM AT MARY BALDWIN COLLEGE DOES NOT REMEDY THE UNCONSTITUTIONAL EXCLUSION OF WOMEN FROM VMI BECAUSE THE SEPARATE, DIFFERENT VMI AND VWIL PROGRAMS THEMSELVES VIOLATE EQUAL PROTECTION

As we have shown above, the court of appeals erred in assuming in its original remand order that separate "parallel programs" might be an appropriate remedy for the constitutional violation in this case. Pet. App. 156a. The court further erred in finding

[22] The Air Force Academy at Colorado Springs was not included in the 1986 VMI study regarding the predicted effects if VMI were to admit women, and was not addressed in the district court's findings. The Air Force Academy's student body is now approximately 15% women.

VWIL's program an adequate "parallel" to VMI under the Equal Protection Clause. There are substantial, undisputed differences between VMI and VWIL that render VWIL unable to provide to women what they are denied at VMI. Nor are those differences the product of happenstance; they are deliberate and are unconstitutionally premised on explicit and archaic sex-based stereotypes and generalizations about the sociological and psychological characteristics of women and men. Especially in view of the role of education in shaping individual skills and aspirations, reliance on stereotypes to exclude women from VMI unconstitutionally "reflect[s] and reinforce[s] patterns of historical discrimination." *J.E.B.*, 114 S. Ct. at 1428.

A. Classifications That Deny Opportunities To Individuals Based On Their Sex Should Be Subjected To Strict Judicial Scrutiny

We demonstrate herein that respondents have failed to offer the "exceedingly persuasive justification" necessary to justify their proposed remedy under intermediate judicial scrutiny. See *Hogan*, 458 U.S. at 724. But we believe that strict scrutiny is, in fact, the correct constitutional standard for evaluating differences in official treatment based on sex, and that the complete exclusion of women from VMI's unique and valued public educational program should be reviewed under that standard. VMI should be permitted to maintain its men-only admissions policy only if that policy is narrowly tailored to serve a "compelling" state interest. See *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 440

(1985); *Frontiero* v. *Richardson*, 411 U.S. 677, 682 (1973) (plurality opinion).[23]

This Court has recognized—and this case illustrates—that sex "generally provides no sensible ground for differential treatment." *Cleburne*, 473 U.S. at 440. Although the phenomena of sex and race discrimination differ from each other in some important respects, sex, like race, is an immutable and highly visible characteristic that "frequently bears no relation to ability to perform or contribute to society." *Frontiero*, 411 U.S. at 686 (plurality opinion). Governmental decision-making based on stereotypical views and "gross generalizations" about women and men nevertheless persists. *J.E.B.*, 114 U.S. at 1427. The fact that a person's sex is readily observed yet rarely relevant makes it both a common

[23] Regardless of the level of judicial scrutiny, federal executive and congressional policies and programs having to do with the conduct and control of military affairs should continue to receive the judicial deference they have traditionally been accorded. See, *e.g.*, *Weiss* v. *United States*, 114 S. Ct. 752, 760 (1994) ("[C]ourts must give particular deference to the determination[s] of Congress, made under its authority to regulate the land and naval forces.") (internal quotation marks omitted); *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986) ("Our review of military regulations * * * is far more deferential than constitutional review of similar laws or regulations designed for civilian society."); *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981) ("[P]erhaps in no other area [than Congress's authority over military affairs] has the Court accorded Congress greater deference."); *Parker* v. *Levy*, 417 U.S. 733, 756, 758 (1974) ("Congress is permitted to legislate both with greater breadth and with greater flexibility" when the statute governs military society); *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953). VMI is not part of the United States military, and its interests are not entitled to any special deference.

and presumptively impermissible basis for official decision. Special judicial vigilance is required to prevent sex from serving as a convenient, but harmful and constraining, proxy for actual abilities and needs.

Members of the Court have also noted the many parallels between women's and racial minorities' experience of official discrimination. When four Justices in *Frontiero* maintained that classifications based on sex, like those based on race, national origin, or alienage,[24] were "inherently suspect," they particularly noted this country's "long and unfortunate history of sex discrimination," including the historical similarities in the treatment of women and blacks. 411 U.S. at 684-685. In *J.E.B.*, that history continued to inform the level of scrutiny through which the Court reviews sex-based differences in treatment. 114 S. Ct. at 1425. Respondents here seek to perpetuate a sex-based exclusion that dates from a time when women could neither vote nor "hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children." *Ibid.* (quoting *Frontiero*, 411 U.S. at 685). This case is a particularly vivid illustration of the ways in which the hand of the past can continue to control current attitudes and opportunities for women.

Despite the fact that women are a numerical majority in the United States, women remain vastly

[24] Alienage and national origin classifications are suspect, although, like sex classifications, they do not share all of the characteristics of racial classifications. See, *e.g.*, *Graham* v. *Richardson*, 403 U.S. 365, 370-375 (1971); *Sugarman* v. *Dougall*, 413 U.S. 634, 641-643 (1973).

politically underrepresented in state and federal government. That relative political powerlessness also demonstrates the need for searching judicial analysis when government treats men and women differently. *Frontiero*, 411 U.S. at 684-686 & n.17.

Over the past two decades, decisions by this Court striking down a variety of policies and practices that discriminate on the basis of sex have evidenced "a strong presumption that gender classifications are invalid." *J.E.B.*, 114 S. Ct. at 1433 (Kennedy, J., concurring in the judgment). To remove any remaining ambiguity about the general illegitimacy of classifications that deny valuable benefits to individuals based solely on their sex, this Court should now hold that such classifications are inherently suspect and subject to strict judicial scrutiny.[25] This Court, however, has not previously applied that level of scrutiny to sex-based classifications. See, *e.g.*, *id.* at 1425 n.6 (finding it "once again" unnecessary to decide whether sex-based classifications are "inherently suspect"); *Hogan*, 458 U.S. at 724 n.9. We therefore argued in the courts below, and we show in the balance of this brief, that VMI's policy of excluding women cannot stand under the "intermediate" scrutiny applied by this Court in its prior cases. Reversal would, of course, also be compelled under a strict scrutiny standard.

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[25] Strict scrutiny of such classifications based on sex will not necessarily be "fatal in fact." For example, where discrimination persists, "government is not disqualified from acting in response to it." *Adarand Constructors, Inc.* v. *Peña*, 115 S. Ct. 2097, 2117 (1995). The compelling interest in respecting individuals' privacy would clearly justify separate arrangements for men and women while sleeping and while using bathroom and shower facilities.

B. The VWIL Remedy Plainly Violates Equal Protection Under Intermediate Scrutiny

1. *VWIL is materially different from VMI in ways that impermissibly reflect and reinforce archaic stereotypes about women and men*

Both courts below acknowledged that the proposed VWIL, in the words of the district court, "differs substantially from the VMI program." Pet. App. 55a. Stark differences exist in the curricula and educational techniques used at the two institutions. See *id.* at 7a-12a, 18a n.*, 24a-28a, 67a-68a; see pages 2-5, 8-11, *supra*. And as the district court tellingly found, "even if all else were equal between VMI and [VWIL], the VWIL program cannot supply those intangible qualities of history, reputation, tradition and prestige that VMI has amassed over the years." Pet. App. 60a (footnote omitted); see pages 22-23, *supra*.

Despite those differences, the district court approved the creation of a separate VWIL as a remedy by relying on the generalization that women are more psychologically and sociologically suited than men to a confidence-building, public-service-oriented program, while VMI's rigorous military-style training is more suitable for men. The court, for example, expressly embraced the view that women are less confident and aggressive than men. Pet. App. 64a, 73a.

The district court's stereotypical sex-based generalizations reflect the justifications presented by respondents at trial. Respondents' witnesses' testimony, including the testimony of their experts, frequently employed impermissible stereotyping. One of respondents' experts, for example, declared that "aggressiveness [and] the fear of failure[] are not

incentives that propel women to want to succeed and to achieve success" to "the same extent as seen in males." *VMI I* C.A. App. 1177. Another stated that women are "not capable of the ferocity requisite to make the program work, and they are also not capable of enduring without * * * psychological trauma if they went through the rat program." *Id.* at 202. A third proclaimed that "women basically have not the same threshold on emotion as men do. * * * [T]hey break down emotionally." *Id.* at 1057-1058. "[I]n the rat line with a bunch of upperclassmen all over her, [a woman would] break[] down crying." *Id.* at 1058. An expert also insisted that "even * * * those women who * * * are more macho than thou would not make up a cohort who would be able to deal with rats in the invariant way that VMI now deals with rats." *Id.* at 192.

VMI's expert on higher education concluded that VMI's focus on "absolute equality" would be inappropriate for women because women "respond more naturally to an ethic of care," premised on the notion that "no one should be hurt," rather than an egalitarian "ethic of justice." *VMI I* C.A. App. 1754 (L. 222) (emphasis omitted). The same expert found the "doubting" aspect of the adversative model inappropriate for women, because, for women, "confirmation" is "a prerequisite rather than a consequence of development." *Id.* at 1755 (L. 223). And VMI would be inappropriate for women, he concluded, because women develop through "a relationship of connection" and "a sense of community" rather than through self-discipline and self-reliance. *Ibid.* VMI's experts also relied on "the different vulnerabilities of men and women," *VMI II* C.A. App. 684, to conclude that the strain imposed by men on the rat line would be

matched at VWIL by exposure to "fields in which women at the present so often flounder. Spatial things, geometric things, topology, math and physics, and leadership itself." *Id.* at 684-685.

Another of VMI's expert witnesses analogized women who would be attracted to VMI and women who would be attracted to VWIL to two types of women in the late 19th century: Women who would prefer VMI were like those earlier women with "high-roller ambition" who aspired to become lawyers, *VMI II* C.A. App. 578-579—aspirations the expert deemed "as much fancy as * * * reality," *id.* at 579. The women who would prefer VWIL were more like realistic 19th-century women who "became nurses, teachers, librarians because those were the professions they could enter." *Ibid.* Another expert stated that even women who are confident and outgoing, as opposed to "overdisciplined, oversubdued, and self-mistrustful," could benefit from VWIL, because they would be "reminded that their leadership styles, while impressive, have also the hazard of being oppressive." *Id.* at 681-682. Those women would "profit" from VWIL "by discovering limitations to their strenuousness." *Ibid.*

One of respondents' experts concluded that admission of women would impair the VMI system because of "the dating" and young women's "aspirations" to marry that are "still in the south very common." *VMI I* C.A. App. 196-197. "[W]omen in such a setting are almost inevitably cheerleaders. Girls don't follow sports the same way boys do." *Id.* at 221-222.[36] Admis-

[36] The same expert commented "[o]ne reason I suspect [girls] don't do as well on verbal tests, they don't read as many sports stories as boys do." *VMI II* Tr. 546.

sion of women to VMI would not work, in part because, "in Virginia, there are still men who divide the women into two classes, the good girls and the bad girls." *Id.* at 197. Women could not be "rats" because "[t]hey can't shed their gender. They can't shed their physical attributes." *Id.* at 193.

This Court's decisions preclude basing different treatment of men and women on such stereotypical characterizations of the sexes. *Hogan* clearly instructs that "[c]are must be taken in ascertaining whether the [government's] objective itself reflects archaic and stereotypic notions." 458 U.S. at 725. The Court there invalidated a single-sex admissions policy in part because the policy "tend[ed] to perpetuate the stereotyped view of nursing as an exclusively woman's job," and "ma[de] the assumption that nursing is a field for women a self-fulfilling prophecy." *Id.* at 729, 730. Excluding women from VMI, and providing them with an all-female alternative that is not a rigorous military school, perpetuates exactly the same kind of impermissible association of each sex with particular professions—here the premise that men, and not women, are fit to be strong leaders in the military and other fields that require leaders to cope with adversity.[27]

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[27] The particular stereotypes upon which the court below relied are distressingly similar to Justice Bradley's discredited conclusion in *Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring in the judgment), that women's "natural and proper timidity and delicacy" supported the exclusion of women from the practice of law. See generally *Orr*, 440 U.S. at 283 (statute requiring payment of alimony to women but not to men carried "the baggage of sexual stereotypes"); *Califano* v. *Goldfarb*, 430 U.S. 199, 217 & n.18 (1977) (plurality opinion) (statutory distinction between widows' and widowers' social security survivors' benefits was based on "archaic and overbroad" generalizations); *Craig* v. *Boren*, 429 U.S. 190, 198-199 (1976) (distinction between ages at which males and females can purchase 3.2% beer reflected "outdated misconceptions"); *Stanton* v. *Stanton*, 421 U.S. 7, 15 (1975) (statute setting different ages of majority for girls and boys relied on "role-typing society has long imposed"); see also *Bray* v. *Alexandria Women's Health Clinic*, 113 S. Ct. 753, 759 (1993) (describing as "objectively invidious" under 42 U.S.C. 1985(3) the purpose of "'saving' women *because they are women* from a combative, aggressive profession such as the practice of law").

Even where stereotypes may in part reflect current realities, the Court has condemned them, both because present practices may themselves result from historical sex-based bias, and because the law must not operate to restrict men and women to socially assigned roles. *J.E.B.*, 114 S. Ct. at 1428 (law must not "reflect and reinforce patterns of historical discrimination").[28] The lower court's finding that, for example, women are less aggressive than men may reflect the effects of traditional sex-based limitations on social roles that have often discouraged aggressive behavior in women while encouraging it in men.

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[28] In rejecting the argument in *Stanton* that a statute establishing a lower age of majority for girls than for boys was justified because boys often stay in school and require parental support for longer than girls, the Court observed that "[t]o distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed." 421 U.S. at 15. See also *Craig*, 429 U.S. at 202 n.14 ("The very social stereotypes that find reflection in age differential laws are likely substantially to distort the accuracy of * * * comparative statistics" regarding drinking and driving).

Barring women from VMI's adversative training makes women's presumed unfitness for it, and for the leadership opportunities it creates, as much a "self-fulfilling prophecy" as the presumption about natural sex roles rejected in *Hogan*. 458 U.S. at 730.

2. *Generalizations about women and men cannot support sex-based classifications, such as VMI's admissions policy, that foreclose individual opportunity*

The Mary Baldwin College Task Force developed a significantly different program for VWIL because it concluded that "aspects of VMI's military model, especially the adversative method, would not be effective for *women as a group*." Pet. App. 8a (emphasis added). But the Task Force, and the court that approved VWIL as a remedy, did not purport to find—nor could they possibly have found—that *all* women are less aggressive or less confident than *all* men, or that VMI's program was educationally inappropriate for *all* women. Indeed, they candidly acknowledged that VMI's adversative methodology is not "inherently unsuitable to women," *id.* at 155a, and that some women would indeed be qualified for, would prefer, and would benefit from that methodology, *id.* at 76a, 155a; see *id.* at 74a, 223a, 234a. The court nonetheless approved the VWIL program on the premise that *average* psychological and sociological differences between the sexes can justify denying *all* women admission to an educational program that some fully qualified women want to enter.

The Equal Protection Clause condemns such a use of sex-based generalizations, both because they deny to women who do not conform to those generalizations opportunities afforded to all men (whether they fit

them or not), and because the most basic equal protection principles require that women and men be treated as individuals, not as members of groups that are conclusively presumed to have or to lack certain capacities or ambitions. Women whose choices or abilities are different from those of the "typical" or "average" woman cannot be denied an important educational opportunity, and be relegated instead to a substantially different program that they do not want and that does not meet their needs, solely because most women would not be inconvenienced by that limitation.[20]

Even where there are statistically significant differences between the behavior or attitudes of men and women, the Court has consistently invalidated legal restrictions or generalizations based on those

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[20] See, *e.g.*, *J.E.B.*, 114 S. Ct. at 1429; *id.* at 1432 (O'Connor, J., concurring); *id.* at 1433-1434 (Kennedy, J., concurring in the judgment); *Jaycees*, 468 U.S. at 625 ("overbroad assumptions about the relative needs and capacities of the sexes force[] individuals to labor under stereotypical notions that often bear no relationship to their actual abilities"); *Hogan*, 458 U.S. at 726 (rejecting "outdated assumption that gender could be used as a 'proxy for other, more germane bases of classification'") (quoting *Craig*, 429 U.S. at 198); *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980); *Orr*, 440 U.S. at 280-281, 283; *Goldfarb*, 430 U.S. at 204-207 (plurality opinion); *id.* at 219-220 (Stevens, J., concurring in the judgment); *Stanton*, 421 U.S. at 14-15; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 645 (1975); *Frontiero*, 411 U.S. at 686-687 (plurality opinion); *Reed* v. *Reed*, 404 U.S. 71, 76-77 (1971); but see *Bradwell*, 83 U.S. (16 Wall.) at 141-142 (Bradley, J., concurring in the judgment) (upholding sex-based exclusion of women from law practice even though the rationale for disqualifying women does not apply to all women, because "the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases").

differences. Although some "truth may be contained in some stereotypes," this Court has "made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization." *J.E.B.*, 114 S. Ct. at 1427 n.11 (citing *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 645 (1975)).[30] Sex may as a factual matter correlate with certain attitudes, but the Equal Protection Clause deems sex, like race, "irrelevant as a matter of constitutional law" to the government's assessment of an individual's predispositions. 114 S. Ct. at 1432 (O'Connor, J., concurring). The constitutional determination that sex does not determine attitude or personality is "a statement about what this Nation stands for," even where it may not be "a statement of fact." *Ibid.*

[30] See also *Craig*, 429 U.S. at 200-201 (invalidating sex-based differential ages for beer purchase despite statistics showing that young men in the relevant age group presented greater safety risks as a result of drunk driving than did young women); *Weinberger*, 420 U.S. at 645 (invalidating sex-based social security survivors' benefits despite "empirical support" that men are more likely than women to be primary breadwinners); *Frontiero*, 411 U.S. at 688-689 (plurality opinion) (invalidating presumption of wives' but not husbands' dependency for purposes of benefits determinations despite "empirical" fact that "wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives").

3. *Respondents have not demonstrated an interest in single-sex education, and such an interest would not, in any event, justify excluding women from VMI*

The court of appeals mischaracterized the issue in this case as "whether a state may sponsor single-gender education without violating the Equal Protection Clause of the Fourteenth Amendment." Pet. App. 4a. That is *not* the issue.[31] Assuming that a State may be able, consistent with equal protection principles, to establish single-sex educational programs in appropriate circumstances,[32] Virginia nevertheless cannot continue to reserve VMI only for men.

The exclusion of one sex from a college program reserved for the other involves sex-based classi-

[31] Moreover, the result we urge in this case would not affect the constitutionality of private single-sex colleges, even when they receive public funds or tax exemptions. The provision of public funding, even when accompanied by extensive government regulation, does not convert privately controlled institutions into government actors subject to constitutional restriction, or render the government constitutionally responsible for a private entity's policies. *Blum* v. *Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982).

[32] Contrary to the assumption of the court of appeals, single-sex education is not self-justifying. See Pet. App. 253a (Motz, J., dissenting from denial of rehearing en banc). The exclusion of one sex from a program reserved for the other, however, can be a means to achieve an important (or compelling) governmental goal, such as eradication of the effects of discrimination in the existing educational system. For example, public single-sex education may be permissible based on a "compensatory purpose" if it were shown that "members of the gender benefited by the classification actually suffer a disadvantage related to the classification." *Hogan*, 458 U.S. at 728.

fications. Such classifications must be constitutionally justified. *Hogan* requires an "exceedingly persuasive justification" for them when they result in the sex-based denial of access to an educational program solely on the basis of sex. 458 U.S. at 724. The relevant inequality caused by respondents' exclusion of women from VMI in this case lies in the fact that it reserves the benefits of VMI's program, prestige and powerful alumni network exclusively to men. It is undisputed that no school in Virginia—including VWIL—offers to women the same or even a closely similar program, with its associated prestige and alumni support. In light of the dramatic differences between the two programs, respondents must establish an important governmental interest in offering VMI's benefits to men, but not women, and they must also prove that the exclusion of women from VMI is needed to serve that interest.[33]

Respondents' invocation of a generalized interest in single-sex education cannot justify single-sex programs that are vastly different in content and in the value of the degrees they offer. Moreover, establishing a justification for offering a single-sex educational opportunity on the ground that some students may learn better in such an environment does not support confining all students seeking a military-style leadership education to such programs. And respondents have failed in this case to demonstrate that they do,

[33] In *Hogan*, the material benefit that plaintiff was denied (given his access to other, equal nursing schools in the State) was Mississippi University for Women's proximity to his home. Yet the Court held that he should be admitted to MUW. Women denied admission to VMI suffer a significantly greater deprivation.

in fact, have a genuine interest in providing single-sex education to college students in Virginia. Respondents asserted such an interest at the liability phase, but that contention was obviously pretextual: Respondents could not explain why, if they sought to provide Virginians with the option of single-sex education, such an option was provided to men but not to women. Pet. App. 151a-152a. Virginia also had no law or official policy statement supporting single-sex education. *Id.* at 153a. The Commonwealth's general abandonment of all other single-sex education years ago, including the conversion to coeducation of each of its four previously all-female public colleges, further demonstrated the absence of any genuine and important, sex-neutral state interest in single-sex education. *Id.* at 154a.[34]

The court of appeals upheld respondents' remedial choice because it did not correctly apply *Hogan*. Through the use of its "special intermediate scrutiny" test, it did not meaningfully question—as it was required to—whether the separation of men and women into substantially different programs at VMI and VWIL was needed in order to serve an important state purpose, or whether that separation was, instead, impermissibly premised on overbroad and archaic generalizations. That court's legal analysis

[34] See *Weinberger*, 420 U.S. at 648 n.16 (court "need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation"); see also *Hogan*, 458 U.S. at 730; *Califano* v. *Westcott*, 443 U.S. 76, 86-88 (1979); *Goldfarb*, 430 U.S. at 212-213 (plurality opinion).

was wholly inconsistent with this Court's constitutional sex discrimination cases.[35]

The court of appeal's deferential approach to respondents' asserted interests was especially inappropriate here in view of the remedial posture of this case. Respondents violated the Constitution. VMI's exclusionary policy, dating from 1839, was indisputably based from its inception on archaic assumptions about men's fitness and women's incapacity for military-style leadership training. Respondents failed at the liability stage of this case to provide any constitutional justification whatever for having elected to continue to maintain that anachronistic and harmful policy through the late 20th century.[36] They bear a heavy burden to prove that they have erased all effects of that discrimination, that any prospective interest they now assert in single-sex education is, at the very least, important and genuine, and that exclusion of women from VMI is necessary to achieve that interest. They have not satisfied that burden.

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[35] The court of appeals' "special intermediate scrutiny" test reduces to a requirement that separate single-sex programs be sufficiently "comparable" so that the benefits provided to one gender do not "tend[], by comparison to the benefits provided to the other, to lessen the dignity, respect, or social regard of the other gender." Pet. App. 17a. That analysis is reminiscent of *Plessy* v. *Ferguson*, 163 U.S. 537, 549-550 (1896), which approved racial segregation so long as it was "reasonable," and "not for the annoyance or oppression or a particular class."

[36] Although single-sex education may not necessarily send a stigmatizing message that renders it "inherently unequal," cf. *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954), the exclusion of women from VMI *does* send a powerful, harmful message. See pages 24-25, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Supreme Court of the United States
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UNITED STATES OF AMERICA,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,
Respondents.

COMMONWEALTH OF VIRGINIA, *et al.*,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA,
Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether the Equal Protection Clause permits a State to offer a pedagogically beneficial single-sex college program as a complement to a large and diverse statewide system of public and private higher education that provides extensive and varied educational opportunities for both men and women.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1941

UNITED STATES OF AMERICA

Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

No. 94-2107

COMMONWEALTH OF VIRGINIA, *et al.*,

Cross-Petitioners,

v.

UNITED STATES OF AMERICA

Cross-Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR THE CROSS-PETITIONERS

Cross-petitioners the Commonwealth of Virginia, Governor George F. Allen, the State Council of Higher Education for Virginia, the Virginia Military Institute, its Board of Visitors and Superintendent, the VMI Foundation, Inc., and the VMI Alumni Association respectfully submit this brief in support of the constitutionality of the single-sex education component of Virginia's system of higher education.

INTRODUCTION

This case involves the circumstances, if any, under which

the Equal Protection Clause of the Fourteenth Amendment permits a State to support single-sex education at one or more of its institutions of higher education.

Virginia maintains a higher education system that is overwhelmingly coeducational, but which includes an option for a small number of students to attend a single-gender public college. Virginia also provides financial support for numerous private colleges, most of which are coeducational, but five of which have single-sex admissions policies.

This litigation was initiated by the United States to challenge the male-only single-sex admissions policy of the Virginia Military Institute (VMI) at a time when all of Virginia's other 14 public colleges were coeducational. The court below held that Virginia had established ample justification for a single-sex component in its diverse educational spectrum, but had not justified its determination to afford that opportunity to men and not women.

After that decision, Virginia created a single-sex college program for women, known as the Virginia Women's Institute for Leadership (VWIL), at Mary Baldwin College (MBC), a women-only private college. The courts below have now approved the constitutionality of Virginia's higher education system as presently constituted, with its predominantly coeducational emphasis and limited and comparable single-sex components for men and women.

In *United States v. Commonwealth of Virginia*, No. 94-1941, this Court granted the Government's petition for a writ of certiorari challenging the decision below. Cross-petitioners will defend that decision in their brief as respondents in No. 94-1941. The Court also granted cross-petitioners' conditional cross-petition for a writ of certiorari (No. 94-2107) challenging the initial determination by the court below that Virginia could not continue VMI as a male-only public college without establishing a comparable

facility for women. That issue will be addressed in this brief.[1]

Cross-petitioners maintain that the initial decision below concerning liability is not required by this Court's equal protection jurisprudence and will unduly and unnecessarily inhibit States in the development of programs to meet the special and demonstrated needs of their citizens. The liability ruling has the effect of precluding government-sponsored single-sex education for students of one gender absent a parallel program for students of the other gender. That standard does not permit States to take into account the pedagogical value of single-sex education for some students, the differing educational needs and interests of students, the judgment of educators in developing programs, the overall mix of educational options made available to students in the public and private sectors, or the importance of state and local discretion in devising beneficial and effective means of education for students of both genders within the financial constraints imposed on funding for education. For the reasons set forth in this brief, the court of appeals erred in restricting the ability of government to use single-sex educational programs as one part of a broad spectrum of educational approaches professionally designed to respond to the varied needs and preferences of students of all ages.

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[1] Cross-petitioners are committed by legislation to single-sex education as a beneficial pedagogical option for both men and women and intend to continue offering this option through VMI and VWIL even if this Court holds that parallel programs are not a prerequisite to a State's ability to offer the benefits of single-sex education to its citizens. Cross-petitioners merely seek to preserve the discretion of state and local governments to improve and diversify all levels of their educational systems through innovative and successful programs similar to those at VMI and VWIL.

OPINIONS BELOW

The opinion of the court of appeals regarding liability is reported at 976 F.2d 890, and is reproduced at pages 134a-157a of the appendix to the petition for a writ of certiorari in *United States v. Virginia*, No. 94-1941 (filed May 26, 1995) (hereinafter "Pet. App."). The opinion of the district court regarding liability (Pet. App. 158a-245a) is reported at 766 F. Supp. 1407. The opinion of the court of appeals regarding remedy (Pet. App. 1a-52a) is reported at 44 F.3d 1229. The opinion of the district court regarding remedy (Pet. App. 53a-131a) is reported at 852 F. Supp. 471.

JURISDICTION

The judgment of the court of appeals regarding liability was entered on October 5, 1992. That judgment vacated and remanded the case to the district court for further proceedings. Pet. App. 156a. This Court denied a petition for a writ of certiorari filed by cross-petitioners seeking interlocutory review of that judgment. *VMI v. United States*, 113 S. Ct. 2431 (1993) (No. 92-1213).

After remedial proceedings in the district court on remand, cross-respondent filed a notice of appeal, and cross-petitioners filed a timely notice of cross-appeal challenging the original finding of liability. The judgment of the court of appeals affirming and remanding the case for further proceedings (Pet. App. 30a) was entered on January 26, 1995.

On April 18, 1995, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 26, 1995. Cross-respondent the United States filed a petition on the latter seeking review of the judgment below. *See United States v. Virginia*, No. 94-1941. Cross-petitioners received that petition on May 26, 1995, and filed a timely cross-petition for a writ of certiorari on June 26, 1995, pursuant to this Court's Rules

12.3 and 13.5. This Court granted both the petition and the cross-petition on October 5, 1995. The jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

A. Background

1. Virginia's System of Higher Education

The Commonwealth of Virginia provides financial support for a "diverse array" of public and private colleges and universities. Pet. App. 187a. The State Council of Higher Education for Virginia (SCHEV) has declared that "'Virginia has always recognized that there are many kinds of excellence and has supported a diversity of missions among its institutions of higher education.'" *Id.* Indeed, "[o]ne special characteristic of the Virginia system is its diversity," and Virginia's colleges and universities "collectively form one of the most diverse -- and increasingly excellent -- systems of higher education in the nation." I DX 23 at 11 (I JA 1707).[2] In furtherance of this express

[2] "I DX" refers to defendants' (*i.e.*, cross-petitioners') exhibits at the liability trial. "II DX" refers to cross-petitioners' exhibits at the remedy trial. "I Tr." and "II Tr." refer to the transcripts of the liability and remedy trials, respectively. "I JA" and "II JA" refer to the joint appendices filed in the court of appeals at the liability and remedy stages, respectively. "L." refers to the parties' joint lodging in this Court of materials from the record.

policy of providing a wide spectrum of educational opportunities and experiences, the Boards of Visitors of the various public colleges and universities in Virginia "have traditionally enjoyed, and now enjoy, broad autonomy in the determination of such issues as the institution's mission . . . and the composition of its student body." Pet. App. 187a; *see also id.* at 138a-39a. In short, "the hallmarks of Virginia's educational policy are 'diversity and autonomy.'" *Id.* at 187a.

There are more than a dozen public four-year undergraduate institutions in Virginia, including the University of Virginia (one of the Nation's leading universities) and other schools that have been recognized regionally or nationally for academic excellence. Pet. App. 185a-86a; Stipulations of Fact ("Stips.") 41-42 (I JA 86-87; L. 68-69).[3] These four-year institutions enrolled 85,441 women and 72,819 men in 1989. Pet. App. 187a.

Although almost all of Virginia's public colleges and universities are presently coeducational, Virginia has a long-standing tradition of supporting single-sex education. Most of Virginia's public colleges and universities originally offered single-sex education. Four of these public institutions -- Longwood College, James Madison University, Mary Washington College, and Radford University -- originally admitted women only. Pet. App. 175a n.10,

[3]Virginia's public four-year undergraduate institutions include: Christopher Newport College, Clinch Valley College, College of William and Mary, George Mason University, James Madison University, Longwood College, Mary Washington College, Norfolk State University, Old Dominion University, Radford University, University of Virginia, Virginia Commonwealth University, Virginia Military Institute, Virginia Polytechnic Institute and State University, and Virginia State University. Pet. App. 185a-86a.

185a-87a. These institutions chose to become coeducational only in the late 1960's and early 1970's as a result of financial pressures and the growing popularity of coeducation. II Tr. 642, 660; *see also* I JA 173-75, 212-13.

The Commonwealth's sponsorship of public single-sex undergraduate programs is only one part of its overall support for single-sex education. Virginia has long recognized that "'[h]igher education resources should be viewed as a whole -- public and private.'" Pet. App. 191a; *see* Stips. 26, 28-32 (I JA 71, 73-77; L. 53, 55-59). The State Council is charged with the task of preparing and implementing a master plan for higher education in Virginia that takes into account the missions, programs, and enrollment of all institutions of higher education in the Commonwealth, both public and private, with the goal of providing diverse educational opportunities without unnecessary duplication. Stips. 86-87 (I JA 81-82; L. 113-14). Thus, "Virginia relies on its independent [*i.e.*, private] institutions [of higher education] to offer students choices and meet the educational needs of people in the Commonwealth." Pet. App. 191a.

There are approximately 36 private colleges and universities authorized to award undergraduate degrees in Virginia. II DX 16 at 109-37. Five of these institutions are four-year colleges that provide single-sex education. Hampden-Sydney College provides undergraduate education for men, while Randolph-Macon Women's College, Mary Baldwin College, Sweet Briar College, and Hollins College provide undergraduate education for women. In the fall of 1989, 3850 women and 2256 men were enrolled in public and private single-sex colleges in Virginia. Pet. App. 189a.

The Virginia Constitution itself recognizes the important role played by private educational institutions in enhancing the diversity of the Commonwealth's overall educational system. In the early 1970's, as Virginia's public women's

colleges were moving to coeducation, the people of Virginia twice amended their constitution to make clear that public funds could be used to support private higher education. Va. Const. art. VIII, § 11; Stips. 26-27 (I JA 71-72; L. 53-54). This provision has been recognized as "'an implicit endorsement of the principle of pluralism in higher education. Its value judgments are twofold: that if private institutions closed their doors, the Commonwealth would have to find the money to educate students who would otherwise have been in a private institution and Virginia's rich tradition of diversity in higher education would be notably weakened.'" Stips. 28 (I JA 73; L. 55).

The Virginia General Assembly has implemented this constitutional mandate through the Tuition Assistance Grant Program, the College Scholarship Assistance Program, and various other state-financed aid programs[4] that provide scholarship grants, guaranteed loans, and work-study funds for students attending private colleges in Virginia, including single-sex colleges. Pet. App. 190a-91a; Stips. 55-59 (I JA 100-04; L. 82-86). In addition, the Commonwealth provides financial support and other assistance to private institutions (including single-sex colleges) through low-cost building loans, state-funded services contracts, and other programs. Stips. 54-55, 59-60, 62-63 (I JA 99-100, 104-05, 107-08; L. 81-82, 86-87, 89-90); Va. Code §§ 23-30.39 to -30.58. The State Council of Higher Education views these programs as a "means by which the Commonwealth can provide funding to its independent

[4]*See, e.g.*, Va. Code §§ 23-38.11 to -38.18 (Tuition Assistance Grant Act); *id.* §§ 23-38.30 to -38.44:3 (Virginia Student Assistance Authorities); *id.* §§ 23-38.45 to -38.50 (College Scholarship Assistance Act); *id.* §§ 23-38.53:1 to -38.53:3 (Virginia Scholars Program); *id.* §§ 23-38.70 to 23-38.71 (Virginia Work-Study Program).

institutions, thereby helping to maintain a diverse system of higher education." I DX 21 at 10 (I JA 1694) (SCHEV Budget Initiatives for 1990-1992: A Concept Paper).

In the aggregate, Virginia's financial support for private single-sex education for women is substantial. I DX 74 (I JA 1971-80; L. 235-45); II DX 13 & 14. This aid "'demonstrates the Commonwealth's commitment to private higher education'" and "'is as much of an institutional support program as it is a program to assist students.'" Stips. 56 (I JA 101; L. 83).

As part of its broad and varied educational system, Virginia offers college students the option of military training through participation in federally funded Reserve Officer Training Corps (ROTC) programs at several public colleges and universities in Virginia, including the University of Virginia, Virginia Polytechnic Institute and State University, VMI, Norfolk State University, Old Dominion University, and James Madison University. Stips. 46-47 (I JA 91-92; L. 73-74). In addition, students at several private colleges in Virginia, including all of the private four-year women's colleges, have the option of participating in ROTC programs. *Id.*

Yet another aspect of Virginia's broad menu of higher education choices is the coeducational residential Corps of Cadets program at Virginia Polytechnic Institute and State University (VPI). VPI is a large public coeducational university that has been listed among the Nation's finest undergraduate institutions. Stips. 42 (I JA 87; L. 69). VPI has more academic course offerings and undergraduate degree programs than VMI, and offers all of the courses (including military instruction) available at VMI. Pet. App. 168a; Stips. 42 (I JA 87; L. 69); I DX 62D, 62E, 62M (I JA 1780-81, 1789; L. 231, 234).

VPI's Corps of Cadets enrolled approximately 360 stu-

dents, including 45 women, in 1993. II DX 88 (L. 344). The mission of the VPI Corps of Cadets is "to produce men and women . . . who are honorable, educated and trained for military service to their country and prepared to be effective leaders in the varied work of military and civil life." Pet. App. 214a.

VPI cadets are required to adhere to military-type regulations and discipline. The Corps of Cadets is organized along military lines, with a chain of command based on a cadet rank system. Cadets are awakened with reveille each morning at 5:30 a.m., march together in formation each day to breakfast and dinner, and participate in scheduled and unscheduled room inspections, uniform inspections, formations, roll calls, and military drills. Pet. App. 217a; Stips. 49, 51 (I JA 94, 96; L. 76, 78).

2. Virginia Military Institute

VMI was founded in 1839 and is a small public four-year college with an enrollment of about 1250 students. It offers majors in the liberal arts, sciences, and engineering. All of its academic offerings are also available at other public colleges and universities in Virginia. Pet. App. 168a; I DX 62C, 62D, 62E, 62M (I JA 1779-81, 1789; L. 230-31, 234).

VMI's mission is "to produce educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary." Pet. App. 203a. VMI employs an "adversative" method for developing character and leadership in young men. That method is intended to cause students to question their past convictions, values and experiences and thereby to prepare them to accept the values and behavior taught by VMI. *Id.* at 175a n.10, 189a, 191a-92.

"Physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior,

and indoctrination in desirable values are the salient attributes of the VMI educational experience." Pet. App. 191a-92a. First-year VMI students are subjected to an extreme form of the adversative model, "comparable to Marine Corps boot camp in terms of both the physical rigor and mental stress of the experience." *Id.* at 194a-95a.

VMI utilizes a "class system" which assigns specific privileges and responsibilities to each class of cadets in order to develop character and leadership. Thus, the first class, or seniors, are responsible for providing overall leadership, writing the standard operating procedures for aspects of the adversative system, and serving as mentors to new cadets. "The class system is a very highly-developed system for cultivating leadership," as it "teaches and reinforces through peer pressure the values and behaviors that VMI exists to promote." Pet. App. 196a.

Cadets at VMI are subject to an honor code, which provides that a cadet "does not lie, cheat, steal nor tolerate those who do." Pet. App. 197a. The honor code "dominates all facets of institutional life" and is enforced by an "honor court" made up of cadets elected by their classmates. *Id.*

Students at VMI live in a four-story barracks housing one class per floor. "There is a total lack of privacy" in the barracks: there are no door locks or window shades, and the doors to the students' rooms contain windows that permit "the officer in charge to . . . see every cadet without anything being hidden." Pet. App. 198a-99a. The barracks features group bathrooms[5] and "close and intimate

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[5]There is one bathroom on each floor, serving up to 400 students. Each bathroom has group showers with about 24 heads. There are no doors on the partitions separating each toilet. Pet. App. 128a, 240a.

quarters." *Id.* In short, "there is literally no place in the barracks that physically affords privacy," and students are thus "under constant scrutiny." *Id.* at 198a, 199a. This total lack of privacy and constant supervision by the entire Corps is an integral part of the VMI experience. *Id.* at 199a.

Strict egalitarianism is a central and essential attribute of the VMI method. "The VMI experience is based on absolute equality, which is achieved through treating everyone in exactly the same way." Pet. App. 237a. The spartan and public nature of life in the barracks "is an aspect of the egalitarian ethic at VMI," as is the fact that VMI imposes the same physical requirements on all students, regardless of ability. *Id.* at 198a, 233a. Every effort is made to subordinate physical or material distinctions among cadets by requiring all cadets to wear the same uniforms, live in the same spare quarters, attain the same level of physical fitness, and undergo the same constant scrutiny by the other cadets.

Unlike the federal military academies, which exist to prepare their graduates for career service in the armed forces, VMI "is directed at preparation for both military and civilian life." Pet. App. 219a. Thus, VMI's military emphasis is primarily a teaching device, designed to serve "the function of teaching self-discipline," and "is a means to an end, not an end in itself." *Id.* at 206a. Although each VMI student must participate in an ROTC program that provides the same training for a military career as the ROTC programs offered at other undergraduate institutions in Virginia, only 15 percent of VMI graduates choose military careers, and "VMI has gone to considerable lengths to assure the public that it is not simply a military college." *Id.* at 219a.

VMI "has been successful in accomplishing [its] goals; specifically, instilling physical and mental discipline, char-

acter, and a kind of moral code." Pet. App. 204a. Indeed, "[t]he school's success and reputation are uncontroverted." *Id.* at 138a. "[A]ll parties . . . acknowledge . . . the positive and unique aspects of the program." *Id.* at 137a.

In 1983, VMI's Board of Visitors created a Mission Study Committee to reexamine the appropriateness of VMI's single-sex admissions policy. A majority of the Committee's members (including the president of a women's college) did not graduate from VMI. The Committee reviewed materials on education and women in the military and made site visits to single-sex and newly coeducational institutions. Pet. App. 208a-12a. After a three-year study, the Committee issued its final report in 1986. *Id.* at 212a. The Committee "found that the admission of women into the VMI Corps of Cadets would alter the mission of VMI" and would require adjustments "in the military and physical demands made upon male cadets" that "contribute to the ethos of which the Virginia Military Institute is proud and which, it is firmly believed, contributes to the unity of the Corps." *Id.* at 212a, 213a-14; I DX 40 at 2 (I JA 1721; L. 196).

The Committee also examined the reasons given by other institutions for changing from single-sex to coeducational status and "found that none of the motivating factors of the other institutions applied to the VMI mission." Pet. App. 214a. On the basis of these findings, the Committee recommended "that VMI should continue to adhere to its mission as an all-male institution." I DX 40 at 2 (I JA 1721; L. 196).

VMI also conducted a comprehensive self-examination "as part of its accreditation by the Southern Association of Colleges and Schools" in 1986. Pet. App. 173a, 213a. The Report of the Reaffirmation Committee of the Commission on Colleges for the Southern Association of Colleges and Schools specifically commended VMI for its

"'thorough'" review of its mission and purpose. Pet. App. 213a.

VMI's Board of Visitors ultimately decided to retain VMI's single-sex admissions policy. Pet. App. 173a, 214a. This decision was reached only after "reasoned and careful analysis" of the findings of the foregoing studies. *Id.* at 214a.

B. Initial Proceedings Below

1. The District Court's Liability Decision

The United States brought suit against Virginia and VMI in 1990, seeking admission of women to VMI. After trial, the district court found for cross-petitioners. Applying this Court's decision in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), the district court examined whether VMI's single-sex admissions policy "'serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives.'" Pet. App. 165a. After "a fact-intensive examination of the practical considerations underlying the challenged policy," *id.* at 166a, the district court concluded that VMI's policy satisfied the requirements of *Hogan*.

Based on extensive expert testimony and academic studies, the court found that a "substantial body of 'exceedingly persuasive' evidence supports VMI's contention that some students, both male and female, benefit from attending a single-sex college." Pet. App. 168a; *see id.* at 167a-70a, 174a, 176a, 225a-27a. This finding was based on the testimony of renowned education experts, including Harvard University sociology professor David Riesman and Richard C. Richardson, Jr., Professor of Educational Leadership and Policy Studies at Arizona State University. Pet. App. 180-81a. As the court explained, that expert testimony demonstrated conclusively that "[f]or many men,

a single-sex college is optimal," because "[a]t an all-male college, adolescent males benefit from being able to focus exclusively on the work at hand, without the intrusion of any sexual tension." *Id.* at 225a.

The district court also found that VMI's adversative method in particular is beneficial to some adolescent males. Pet. App. 203a-06a, 223a-25a.[6] As Dr. Riesman testified, VMI's emphasis on absolute equality "reduces the inherited characteristics of students in terms of wealth, position, name, ethnicity, and race to the lowest common denominator," such that "there are no outsiders at VMI. Everyone is an insider. Everyone is on the same level." Riesman Dep. (I DX 60) at 41, 48 (I JA 177, 184). The VMI method infuses cadets with self-discipline and, as a consequence, "inculcates the value of orderliness, of dedication, . . . of honor, and integrity, of high seriousness, in which everything is serious." Riesman Dep. at 45 (I JA 181). In sharp contrast to society in general and many modern undergraduate institutions, VMI "requires that the student discipline himself, to endure pain, physical and psychological, to meet timetables," thereby ensuring that VMI cadets "emerge as self-disciplined people." Riesman Dep. at 50-51 (I JA 186-87).

The testimony of the other education experts was to the same effect. Clifton Conrad, the Government's expert, explained that VMI "is an institution that has a very powerful ethos, a compelling institutional culture," and it "has nourished and cherished, communicated what it is to so many people in a very, very powerful way." I Tr. 354.

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[6]These findings refer to the developmental characteristics of college-age students, and reflect the sensitive and sometimes difficult nature of the transition from late adolescence to adulthood that such students experience.

The VMI method envelops VMI cadets in "a kind of life, a holistic life, if you will, in which people[] are required to answer a number of obligations [and] . . . responsibilities almost at the same time. And through that kind of immersion in a closed system, they develop over a period of time . . . a certain ability to function effectively under conditions of stress and demands and challenge later on in life." I Tr. 992 (Bunting).

Based on the testimony of these experts, the district court concluded that "VMI has done a very good job of conveying its goals and its values, and has been successful in accomplishing those goals; specifically, instilling physical and mental discipline, character, and a kind of moral code." Pet. App. 204a. The district court further found that "key elements of the adversative VMI educational system . . . would be fundamentally altered, and the distinctive ends of the system would be thwarted, if VMI were . . . to make [the] changes necessary to accommodate" women students. *Id.* at 167a. Making VMI coeducational would require substantial changes to crucial aspects of VMI's educational method, including the rigorous physical training program[7] and the constant scrutiny and total lack of privacy in the barracks.[8] The fact

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[7]*See* Pet. App. 233a ("If women were admitted to VMI, it would be necessary to change certain physical training program courses and to set different standards. . . . Either [some aspects] would have to be abandoned, or there would have to be accommodations that would result in a dual track for women."); *id.* at 234a ("If VMI were coeducational and females were subjected to the same physical demands as male cadets, females would suffer on the order of 300% more injuries than males."); *id.* at 221a.

[8]Pet. App. 233a ("Adaptations would have to made in order to provide for individual privacy, for the sake of the men as well as for the sake of the women. . . . The introduction of privacy

[Footnote continued on next page]

that these changes would occur "is well-founded in empirical evidence, and not based on an archaic stereotype." *Id.* at 171a.

The changes that would result if VMI became coeducational would necessarily lead to differential treatment of distinct groups of VMI students on the basis of gender, thereby contradicting VMI's core principle of absolute equality of treatment.[9] Moreover, coeducation "would produce cross-sex relationships among cadets that would significantly alter the character-building and leadership-development aspects of the VMI experience." Pet. App. 239a. As a result, VMI could not continue to utilize the same program if it were to become coeducational: "it would be impossible for a female to participate in the 'VMI experience,'" because "her introduction into the process would change it. Thus, the very experience she sought would no longer be available." *Id.* at 175a; *see also id.* at 176a, 227a.

On the basis of these findings, the district court concluded: (1) that the "virtually uncontradicted" evidence supports "Virginia's view that substantial educational benefits

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[Footnote continued from previous page]

required by admission of women at VMI would contradict the principle that everyone is constantly subject to scrutiny by everyone else.").

[9]Pet. App. 237a ("The VMI experience is based on absolute equality, which is achieved through treating everyone in exactly the same way. . . . Given the actual physiological, psychological, and sociological differences between males and females, it would be impossible to treat everyone fairly by continuing to treat them the same if women were admitted to VMI. Equal treatment would necessarily give way to fair treatment, thus undermining egalitarianism.").

flow from a single-gender environment" and that those benefits "cannot be replicated in a coeducational setting," Pet. App. 176a; (2) that VMI's admissions policy "adds a measure of diversity to Virginia's overall system of education that would be missing if VMI were coeducational," and that this "diversity is further enhanced by VMI's unique method of instruction which was applauded by all of the educational experts who testified," *id.* at 176a; and (3) that VMI's admissions policy satisfies the requirements of *Hogan* because it is substantially related to the important state objectives of increasing educational diversity and providing the substantial educational benefits of single-sex education and the VMI method, *id.* at 173a, 176a-77a.

2. The Court of Appeals' Liability Decision

The court of appeals affirmed the district court's findings of fact. In particular, the court of appeals upheld the district court's findings that "VMI's unique methodology justifies a single-gender policy" and that "the record supports the conclusion that single-sex education is pedagogically justifiable, and VMI's system . . . even more so." *Id.* at 151a; *see id.* at 137a, 150a, 155a.

The court also affirmed the district court's findings "that VMI's mission can be accomplished only in a single-gender environment and that changes necessary to accommodate coeducation would tear at the fabric of VMI's unique methodology." Pet. App. 148a. The court explained that coeducation would require creation of "a dual track physical training program" which would, in turn, lead to perceptions of unequal treatment, jealousy, and resentment. *Id.* at 146a-47a. The total lack of privacy engendered by the barracks system would no longer be possible. *Id.* at 147a. And the VMI system would be unable to accommodate the cross-sex confrontation and harassment

that would necessarily occur if VMI attempted to maintain its adversative method in a coeducational setting. *Id.*[10] The court of appeals accordingly concluded that the admission of women to VMI "would deny those women the very opportunity they sought because the unique characteristics of VMI's program would be destroyed by coeducation." Pet. App. 148a.

Nonetheless, the court of appeals vacated the judgment of the district court, holding that VMI's policy of admitting only men was unconstitutional because the Commonwealth did not provide a justification for not offering a similar type of educational program exclusively to women. *Id.* at 151a-54a. The court remanded the case to permit the Commonwealth to formulate an acceptable remedy such as "establish[ing] parallel institutions or parallel programs." *Id.* at 156a. This Court denied a petition for a writ of certiorari by cross-petitioners seeking review of the court of appeals' liability determination. *VMI v. United States*, No. 92-1213.[11]

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[10]The court of appeals expressly rejected the Government's claim that this finding was based on stereotyping: "the evidence supported the district court's finding that cross-sexual confrontation and interaction introduces additional elements of stress and distraction which are not accommodated by VMI's methodology." Pet. App. 147a.

[11]On remand, after consultation with education experts, the Commonwealth reaffirmed its commitment to single-sex education and diversity in its higher education system. Accordingly, Virginia decided to establish a state-sponsored leadership education program for women. After careful study, Mary Baldwin College, a private, women-only college, created and implemented the VWIL program with funding and support from the Commonwealth and the VMI Foundation. Pet. App. 63a, 103a-04a. The district court found that VWIL is designed by professional educators to achieve for women the same objectives and outcomes that VMI achieves for men, and

[Footnote continued on next page]

SUMMARY OF ARGUMENT

Under this Court's decision in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), a public school's single-sex admissions policy is constitutional if it "serves important governmental objectives" and is "substantially related to the achievement of those objectives." *Id.* at 724. This Court has recognized that providing diverse educational opportunities is one of the most important objectives of state and local governments. The record in this case conclusively establishes that, as an alternative to a full range of coeducational offerings, single-sex education provides important educational benefits to students who choose it at the elementary, secondary, and undergraduate levels.

Virginia has a long history of support for single-sex education for men and women. Not only does Virginia provide the benefits of single-sex education at VMI, but through a variety of means, including the state's Tuition Assistance Grant Program, Virginia has historically provided substantial financial assistance to students (primarily women) who attend private single-sex colleges in the Commonwealth. Virginia is likewise committed to single-sex education at the elementary and secondary school level. Indeed, the Virginia General Assembly recently authorized local school boards to offer single-sex classes in the state's public schools. *See* Va. Code § 22.1-212.1:1. The existence of single-sex programs necessarily enhances

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accordingly concluded that the mandate of the court of appeals had been satisfied. *Id.* at 53a-131a. The court of appeals affirmed. *Id.* at 1a-52a. Cross-petitioners will address the remedial issues in their brief as respondents in No. 94-1941.

educational diversity in the Commonwealth and provides an educational option that is exceedingly beneficial to some young people.

The record also establishes beyond dispute that VMI provides additional educational benefits to its male students by virtue of its adversative method of education. The meticulous record and comprehensive findings in both courts below establish that the benefits of that method, like the benefits of single-sex education generally, can be attained only in a single-sex environment. In short, requiring VMI to become coeducational would deny the benefits of single-sex education *and* the VMI method to VMI's students without extending those benefits to anyone else.

The court of appeals nonetheless held that a State can provide single-sex education to students of one gender only in the context of a comparable single-sex program for students of the other gender, regardless of student needs and preferences, the professional judgment of educators, or available public resources. This formulaic analysis is erroneous as a matter of constitutional law and educational policy, and it sets a troublesome precedent that, unless reversed by this Court, will stifle experimentation with single-sex education by state and local governments nationwide.

The court of appeals' decision misapplies this Court's decision in *Hogan*. The Court's opinion in that case conducts a detailed factual analysis of the justification for the single-sex admissions policy at a state nursing school for women. The Court's opinion attached *no* constitutional significance to the absence of an all-male nursing school. *Id.* at 720 n.1. Instead, the Court found the single-sex admission policy unconstitutional because, among other things, that policy was based on the "mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women," and was not "necessary to reach any

of [the school's] educational goals," since the school already permitted men to attend classes and thus could not claim to provide the benefits of single-sex education. *Id.* at 726, 731.

In sharp contrast, VMI's single-sex admissions policy is based on sound and well-established pedagogical principles and firmly rooted in fact. And it is directly and substantially related to achieving the important and legitimate benefits of educational diversity, including single-sex education and the VMI method, in a context in which ample single-sex educational opportunities are available for women with public financial assistance, and where a publicly financed coeducational military program already exists. The court of appeals departed from *Hogan* by failing to recognize that these features of Virginia's policies and educational system demonstrate conclusively that Virginia readily satisfies the *Hogan* test.

Instead, the court of appeals erroneously imposed an additional requirement that a State offering a single-sex educational program for members of one gender must provide a comparable program for the other gender as a matter of course. This additional requirement places public educational policy in a constitutional straitjacket and will inhibit States and their political subdivisions from responding to heterogeneous and changing student needs and preferences. For example, the court of appeals' analysis effectively precludes school districts from offering single-sex programs for inner-city youths even though research shows that they are greatly at risk and might benefit from single-sex education options.

Requiring States to offer two single-sex programs in order to justify the continued existence of one program of proven excellence produces only a superficial and formalistic equality while sacrificing the ability of professional educators to respond in the most effective and flexible ways

to the challenge of education in the real world. Under the court of appeals' reasoning, the single-sex programs at schools like VMI and VWIL would become unconstitutional as soon as one or the other ceased to operate or became coeducational because of the needs, interests, or desires of the students attending that school, or because there was an excess of private-sector alternatives for the members of one gender or the other.

The constitutionality of one single-sex program should not turn on the ebb and flow of student interest in or demand for another single-sex program. A State should not be forced to choose between terminating a successful program and wasting scarce resources to sustain an unwanted and perhaps unnecessary parallel facility for students of the opposite gender.[12] Nor should States face endless constitutional litigation over the comparability of parallel programs.

Viewed independently, single-sex programs like the one at VMI (and at VWIL) pass constitutional muster under *Hogan*. That is all the Constitution requires. The court of appeals erred in requiring more.

ARGUMENT

I. PUBLICLY SPONSORED SINGLE-SEX EDUCATIONAL PROGRAMS ARE CONSTITUTIONALLY PERMISSIBLE IF THEY ARE SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF AN IMPORTANT GOVERNMENTAL OBJECTIVE

In *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), this Court applied intermediate scrutiny in review-

[12] In voicing these concerns, cross-petitioners are looking beyond the immediate case involving VMI and VWIL, both of which are valuable and desirable.

ing an equal protection challenge to a public university's policy of admitting only members of one gender to a particular educational program. Under the two-pronged test standard applied by the Court in *Hogan*, a gender-based classification is permissible if (1) "the classification serves 'important governmental objectives'" and (2) "'the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" 458 U.S. at 724.

As the Solicitor General has acknowledged (94-1941 Pet. 19; 94-2107 Br. in Opp. 5 & n.2), the constitutionality of Virginia's single-sex educational programs must be judged under the *Hogan* standard. Accordingly, the question for decision here is whether VMI's single-sex admissions policy is substantially related to the achievement of an important government objective.

II. VMI'S SINGLE-SEX ADMISSIONS POLICY ADVANCES IMPORTANT GOVERNMENTAL OBJECTIVES

A. Providing The Benefits Of Single-Sex College Education And Accomplishing The Objectives Attainable Under The VMI Method Are Important Governmental Objectives

There can be no doubt that providing diverse and pedagogically beneficial opportunities at all educational levels constitutes a legitimate and important governmental objective. "Public education, like the police function, 'fulfills a most fundamental obligation of government to its constituency,'" and "'education is perhaps the most important function of state and local governments.'" *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). As this Court explained in *Norwood v. Harrison*, 413 U.S. 455, 462-63 (1973), government has a "special interest in elevating the quality of education in both public and private schools."

Individuals differ widely in the means by which they may be most effectively stimulated and educated. Therefore, diversity in educational approaches is a legitimate and important goal for government agencies seeking to maximize educational benefits for their citizens. Indeed, as this Court has recognized, "[n]o area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 50 (1973); *accord Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 773 (1973) ("We do not doubt -- indeed, we fully recognize -- the validity of the State's interests in promoting pluralism and diversity among its public and nonpublic schools."). And, this Court has also recognized that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were actually alike." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

It is equally important to vest educators with the freedom to choose among educational alternatives and to use flexible approaches in responding to student needs. Educators must be given latitude to learn from experimentation and to evolve programs to meet student needs. In the primary and secondary school context, for example, "local autonomy has long been thought essential . . . to the quality of the educational process," *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974), and the same is true in higher education. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("'To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.'"); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment) (a university must be free to "'determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study'").

Single-sex educational programs provide a materially more effective learning environment for significant numbers of students and complement the diversity and educational benefits offered by a State's primarily coeducational system of higher education. Thus, the governmental objective of providing such programs is unquestionably legitimate and important. The record and findings in this case conclusively demonstrate that single-sex education and the VMI method provide meaningful and pedagogically valid educational benefits to the students who choose to attend VMI.

The district court found, based on extensive expert testimony and empirical studies, that for some students, "the opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement." Pet. App. 168a. In particular, "[f]or many men, a single-sex college is optimal." *Id.* at 225a (citing Riesman Dep. 39). The court of appeals agreed that the effects on both genders of single-sex education "is almost uniformly positive." *Id.* at 149a. This finding was "amply" supported by the testimony of the nation's leading experts, as well as extensive scholarly research. *Id.* at 149a.

In fact, the Government's education expert agreed with this proposition as well. Dr. Conrad testified that "I'm a believer in single sex education, it has great virtues in lots of ways for lots of people, under lots of conditions." I Tr. 373 (I JA 621). The court of appeals added that single-sex education also had "salutary consequences for sexual equality in the job market" and that students in single-sex colleges "were more likely to set aside initial, stereotypical job aspirations." Pet. App. 149a. Thus, single-sex education performs a valuable service in uprooting inaccurate stereotypes. "The experts for both sides in this case" agreed with these conclusions. *Id.* at 150a.

In addition to the conceded benefits of single-sex

education in general, VMI's methodology has proven to be particularly beneficial to the adolescent male students it attracts. The district court found that VMI "has been successful in . . . instilling physical and mental discipline, character, and a kind of moral code" in its students. Pet. App. 204a. "The VMI experience promotes the development of qualities" such as "[s]elf control, self discipline, and the belief that you must subordinate your own personal desires and well-being to the good of the whole unit." Pet. App. 206a, 207a. VMI "takes students [who] are average from an academic perspective, and through the character development program, graduates people who have more than average commitment and motivation as well as character." *Id.* at 206a.

The court of appeals twice affirmed the district court's extensive factual findings regarding the demonstrable and substantial benefits of single-sex education generally and the VMI method in particular. As the court of appeals explained, the "record supports the conclusion that single-sex education is pedagogically justifiable, and VMI's system . . . even more so." Pet. App. 151a. Based upon the extensive record, including testimony by the Nation's leading experts, the court declared: "[t]hat single-gender education at the college level is beneficial to both sexes is a fact established in this case." *Id.* at 20a.

As the foregoing discussion demonstrates, it is common ground in this case that single-sex college education provides unique educational benefits for some college-age students, and that the VMI method provides additional educational benefits for certain students. The expert testimony at trial, the district court's findings, and the court of appeals' affirmance of those findings foreclose any challenge to those propositions at this stage of the case. It necessarily follows that Virginia's commitment to providing these benefits to its citizens is a valid and important govern-

mental objective.

B. Virginia Has Thoughtfully, Reasonably, And Carefully Structured And Implemented Its Decision To Provide Its Citizens With The Benefits Of Single-Sex Education And The VMI Method

The Commonwealth of Virginia has thoughtfully and reasonably chosen to provide the benefits of single-sex education and the VMI method as components of its diverse system of higher education. The district court found that "[t]he Commonwealth of Virginia has an avowed policy of offering a diversity of choices in higher education." Pet. App. 81a. The Virginia General Assembly and the State Council of Higher Education for Virginia have consistently reaffirmed the importance of maintaining that diversity.[13]

[13]The State Council's biennial plans have repeatedly emphasized the importance of diversity in educational methodology, curriculum, and techniques in higher education. *See, e.g.*, I DX 24 at 23 ("Virginia's special programs to emphasize institutional initiative and experimentation continue to attract national attention"); I DX 26 at 7 ("The goals of Virginia's state-supported system of higher education have been set and remain unchanged. The strategies for achieving those goals through a multi-tiered, highly diverse set of institutions which offers access to virtually every kind of higher educational program and service, are in place"); I DX 28 at 6 ("There is probably no state in the union with independent and state-supported colleges and universities as diverse, and as excellent as Virginia's. . . . The [State] Council urges support of a coordinated system of colleges and universities so that the strength of diversity is complemented by that of carefully coordinated system-wide planning. The Council also urges renewed support of the tradition of college and university autonomy which is a hallmark of Virginia higher education."); I DX 30 at 12, 17 (including within Virginia's "Goals for Higher Education" the intention "to protect and enhance the institutional diversity which exists within Virginia's system of higher education" and "to guarantee the essential autonomy

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As the Council has explained, "Virginia has always recognized that there are many kinds of excellence and has supported a diversity of missions among its institutions of higher education." Stips. 38 (I JA 83; L. 65). Similarly, the 1990 Report to the Governor and General Assembly of the Commission on the University of the 21st Century "urge[s] that the hallmarks of Virginia higher education -- autonomy and diversity -- be maintained in the future." I DX 7 at 36 (I JA 1479). The Virginia Constitution itself contains "'an implicit endorsement of the principle of pluralism in higher education'" by authorizing public financial support for private colleges and universities. Stips. 28 (I JA 73; L. 55).

One of the means by which the Commonwealth has pursued its policy of diversity in higher education is through the authority granted to the governing boards of the several component institutions. The State Council of Higher Education believes as a policy matter that "responsibility to execute general state policy . . . should be decentralized to the greatest extent possible," II DX 16 at 12 (1991 Plan), so that individual creativity and experimentation will be encouraged.[14] In keeping with that policy, the Virginia General Assembly has delegated to each institution responsibility to determine policies of central importance to its respective mission and programs,

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and character of each institution"); *Id.* at 6, 8, 45-46; Stips. 37-38 (I JA 82-83; L. 64-65).

[14]*Accord* I DX 30 at 45 ("Institutions will exhibit greater imagination and capability in dealing with their special opportunities and problems when a maximum of authority consistent with system-wide goals and priorities is vested at the institutional level.").

including admissions policies. *See* Va. Code § 23-9.6:1(2); L. 356. As a result, "'[t]he formal system of higher education in Virginia includes a great array of institutions,'" including "'state-supported and independent,'" "'research and highly specialized,'" and "'single-sex'" schools. Stips. 37-38 (I JA 82-83; L. 64-65) (quoting 1990 Report).

As explained above, several of Virginia's public colleges and universities originally offered single-sex education for women. Pet. App. 175a n.10, 185a-87a. In recent years, however, these institutions decided to become coeducational because of the popular trend in favor of coeducation and the financial pressures caused by that trend. II Tr. 642, 660; *see also* Reisman Dep. 37-39, 76-77 (I JA 173-75, 212-13). Thus, Virginia was without public single-sex higher education for women for the period between 1972 and 1995, an historical anomaly that has disappeared with the creation of VWIL.

Like the governing boards of the other public institutions of higher education in Virginia, VMI's Board of Visitors exercises authority to determine its admissions policy, subject to the General Assembly's ultimate authority to change that policy if it so chooses. Va. Code §§ 23-92, -104. After careful consideration of VMI's admissions policy during the 1980's, VMI's Board of Visitors decided to retain VMI's single-sex admissions policy. As the district court explained, this decision was based on the absence of significant interest among women for access to the VMI method and on the fact that turning VMI into a coeducational institution would irrevocably change VMI's unique mission and program and end its ability to provide students the benefits the VMI system was designed and developed to afford. Pet. App. 212a-14a. Thus, as the district court found, VMI's single-sex admissions policy "has been continued only after reasoned and careful

analysis by the Board of Visitors," the body authorized by the Commonwealth to determine VMI's admissions policy. *Id.* at 214a.

In its original ruling on liability, the court of appeals concluded that the Commonwealth had failed to point to "a stated policy justifying single-sex education in state-supported colleges and universities." Pet. App. 153a.[15] In so holding, the court of appeals appears to have presumed that a governmental objective supporting a gender-based classification can be considered by the courts only if it has been explicitly articulated by the state legislature itself. *Id.*

The court of appeals plainly erred in declining to treat VMI's reasoned decision to retain single-sex education as a component of a larger state policy. Even in cases involving challenges to *racial* classifications subject to *strict* scrutiny,

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[15]The court of appeals also pointed to a suggestion by Virginia's then-Attorney General to the effect that then-Governor Wilder had expressed "personal" reservations about VMI's admissions policy. Pet. App. 142a, 153a. Under Virginia law, however, neither the Governor nor the Attorney General has any authority to determine state policy with respect to the composition of VMI's student body. Rather, as the Commonwealth explained in its answer to the complaint filed by the United States in this case, "[t]he admissions policy of VMI is the exclusive province of the VMI Board of Visitors, subject only to the Virginia General Assembly as provided by law." Answer, ¶ 6 (I JA 29; L. 2). Moreover, then-Governor Wilder later made clear his support for both VMI and VWIL, and the current Governor, Lieutenant Governor, Attorney General, and General Assembly are fully supportive of VMI's (and VWIL's) single-sex admissions policies as part of Virginia's broad-based higher education system. *See, e.g.*, II DX 1-3, 5, 6, 11L, 11M, 11R (II JA 113-23, 125-26, 165-68, 181-84; L. 289-96, 323-26); *see also* Pet. App. 81a n.20 (then-Governor Wilder's "position in this Court has always been one supporting VMI's all male admissions policy").

this Court has consistently given full consideration to the justifications proffered by a State's political subdivisions, without suggesting that such justifications are *per se* invalid absent explicit endorsement from or articulation by the state legislature. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (opinion of O'Connor, J.); *id.* at 498-505 (opinion of the Court); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-78 (1986) (opinion of Powell, J.); *id.* at 287-89 (opinion of O'Connor, J.); *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 311-14 (1978) (opinion of Powell, J.). It follows *a fortiori* that a State's political subdivision may, in the exercise of the powers delegated to it by the state legislature, and consistent with established state policies, choose the means by which to implement important and legitimate governmental objectives. VMI's decision to pursue the benefits of single-sex education and the VMI method is therefore entitled to consideration as an element of a larger important governmental objective, and the court of appeals' ruling to the contrary is incorrect.

As the district court correctly observed, "[t]he record in this case shows the Commonwealth's unambiguous and unequivocal support of single-sex education," and "the Commonwealth's position in this Court has always been supportive of VMI's all-male admissions policy because it adds to the diversity of choices in Virginia's higher education system." Pet. App. 81a. Thus, the Commonwealth (acting through the State Council of Higher Education and the governing boards of each of its colleges, including the VMI Board of Visitors) has chosen to pursue the legitimate governmental goals of providing diverse educational opportunities and the benefits of single-sex education and the VMI method. The first prong of the *Hogan* test is therefore satisfied, and the only remaining question is whether VMI's admissions policy is substantially related to the achievement of these important governmental objectives.

III. VMI'S SINGLE-SEX ADMISSIONS POLICY IS SUBSTANTIALLY RELATED TO ACHIEVING THE IMPORTANT GOVERNMENTAL OBJECTIVES OF PROVIDING THE BENEFITS OF A SINGLE-SEX COLLEGE EDUCATION AND THE VMI METHOD AND ENHANCING DIVERSITY IN HIGHER EDUCATION

As the district court found, "VMI contributes to the diversity of Virginia's higher education in two related ways: (1) by providing an opportunity for single-sex education, and (2) through the unique VMI method of character development and leadership training." Pet. App. 188a. Both of these contributions to the breadth of Virginia's higher education system would be lost if VMI were to become coeducational.

It is self-evident that VMI's policy of limiting admission to men is substantially related to achieving the proven, positive, factually established benefits of single-sex education and the VMI method. Requiring VMI to become coeducational would, by definition, preclude it from providing a single-sex education, thus depriving VMI's students of the benefits provided by such an education without extending those benefits to anyone. As the court of appeals observed, "the only way to realize the benefits of homogeneity of gender is to limit admission to one gender." Pet. App. 22a.[16] Changing VMI's admissions policy would, therefore, entirely frustrate one of Virginia's legitimate and important educational goals by depriving students of an opportunity to learn in a single-sex

[16]That fact serves to distinguish this case from *Hogan*, in which the record was "flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of [the State's] educational goals." 458 U.S. at 731.

environment.

Moreover, as both courts below found, women could not be admitted to VMI without eliminating the very aspects of its program that distinguish it from VPI and other institutions of higher education in Virginia. Pet. App. 6a-7a, 24a-25a, 146a-48a, 170a-73a, 227a, 233a-34a, 237a-39a. Even the Government concedes that coeducation would require substantial changes to VMI's method, including the introduction of dual-track physical education activities for women so as "to reflect the comparable effort of each gender," the creation of privacy rights on the basis of gender, and the elimination of "harassment" deemed inappropriate in a cross-gender context. II JA 99-103, 107-08. The Solicitor General disputes the extent and impact of those changes, but that factual issue was resolved against the Government by both courts below.

The evidence and findings at trial demonstrate that VMI's adversative method would necessarily have to undergo drastic modification if VMI were to become coeducational. As the district court explained, for example, the Marine Corps found that it was unable to maintain the harsh regimen of its boot camps -- which are similar in intensity to VMI's first-year indoctrination -- in a coeducational setting. Pet. App. 195a, 235a. Similarly, West Point modified and then abandoned the adversative model altogether after women were admitted, and it also rejected fixed physical training standards in favor of "comparable" training. Pet. App. 235a-241a. However effective the West Point system may now be in achieving the goals it serves, it cannot accomplish the same results as VMI, which uses different methods to stimulate and educate different types of individuals.

Thus, both courts below were plainly "justified in finding that if women were to be admitted, VMI would have to convert to a dual-track physical training program in order

to subject women to a program equal in effect to that of men." Pet. App. 146a. The result of this departure from VMI's core policy of egalitarianism would be to create perceptions of unequal treatment among cadets, leading to tensions and disparities in treatment that would be incompatible with VMI's educational method. *Id.* at 146a-47a.

In addition, the admission of women to VMI would necessarily entail creation of privacy rights for cadets, at least on gender grounds. Pet. App. 147a. This change would contradict the adversative method's emphasis on complete equality, absence of privacy, and close scrutiny by all other cadets.

Moreover, related aspects of the adversative method would necessarily undergo substantial modifications with the admission of women, because the harassment, scrutiny, and pressure that upperclass students impose on their juniors would undoubtedly "play out differently" when the pressure is imposed by a late adolescent male on a late adolescent female or vice versa. Pet. App. 147a. This "cross-sexual confrontation and interaction" would "introduc[e] additional elements of stress and distraction which are not accommodated by VMI's methodology" and would "significantly alter the character-building and leadership-development aspects of the VMI experience." Pet. App. 147a, 239a.

In short, the fundamental characteristics of VMI's educational method, including the adversative system, the total absence of privacy, and the strict egalitarianism that pervades all aspects of the program, would undergo radical change or disappear altogether with coeducation. It is simply "without a doubt that VMI's present methods of training and education would have to be changed as West Point's were." Pet. App. 172a n.8. As a consequence, the women admitted to VMI would be denied "the very opportunity they sought because the unique characteristics

of VMI's program would be destroyed by coeducation." Pet. App. 6a-7a. Indeed, as the district court observed, "if VMI were to admit women, it would become more similar to the military barracks at VPI, so its uniqueness would be lost." Pet. App. 173a. Thus, one of the experts explained after studying the educational options available in Virginia, "[t]ransforming VMI into a coeducational institution would significantly reduce the postsecondary educational choices available to men without materially altering the range of choices available to women." I DX 58 at 25 (I JA 1757).

The simple truth is that "VMI's mission can be accomplished only in a single-gender environment," Pet. App. 148a, and VMI's students respond most effectively to the VMI method. As a result, "[t]he classification for single-gender education at VMI is . . . directly related to achieving the results of an adversative method in a military environment," because "'the unique characteristics of VMI's program would be destroyed by coeducation.'" Pet. App. 6a-7a, 23a; *see also id.* at 146a-48a, 167a, 175a-76a. Thus, VMI's single-sex admissions policy is precisely tailored to the achievement of the Commonwealth's legitimate objectives, and the second prong of the *Hogan* test is satisfied in this case.

IV. THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE STATES TO OFFER PARALLEL SINGLE-SEX EDUCATIONAL OPPORTUNITIES TO MEMBERS OF EACH GENDER WITHOUT REGARD TO STUDENT INTEREST OR THE EXISTENCE OF OTHER PUBLIC AND PRIVATE EDUCATIONAL OPPORTUNITIES

A. The *Hogan* Test Is Satisfied By The Commonwealth's Showing That VMI's Single-Sex Admissions Policy Is Substantially Related To The Achievement Of Important Governmental Objectives

For the reasons set forth above, VMI's single-sex admissions policy satisfies the two-pronged test enunciated in this Court's decision in *Hogan*. The court of appeals reached its contrary conclusion only by engrafting a third requirement onto the *Hogan* test, precluding States from offering any particular single-sex educational opportunity for members of one gender without proffering a justification for the absence of a "parallel" or "substantively comparable" program for members of the opposite gender. Pet. App. 17a, 155a. That holding goes beyond *Hogan*, which made clear that a State *may* "confer a benefit only upon one class" as long as the "classification is substantially related to achieving a legitimate and substantial goal," *i.e.*, as long as the two prongs of the *Hogan* test are satisfied. 458 U.S. at 724, 731 n.17.

In *Hogan*, of course, the State could not meet this requirement because, as a factual matter, the State's asserted goal was not "the actual purpose underlying the discriminatory classification" and because the single-sex admissions policy was *not* "necessary to reach any of [the university's] educational goals." 458 U.S. at 730, 731. The "uncontroverted record" in *Hogan* revealed "that admitting men to nursing classes [did] not affect teaching style" or "the performance of the female nursing students." *Id.* at 731. Indeed, as the Court explained, men were already permitted to attend and "participate fully in classes" at the university, so the single-sex admissions policy could not be defended on the ground that it was substantially related to achieving the benefits of single-sex education. *Id.*

In this case, by contrast, as explored thoroughly by the courts below, the record conclusively demonstrates that VMI's single-sex admissions policy *is* substantially related to (and indeed absolutely necessary to) the Commonwealth's actual and important goals of providing the enhanced diversity and distinct benefits of single-sex educa-

tion and the VMI method. Those goals would be frustrated, and the important advantages of VMI's single-sex educational method would be lost, if VMI were to become coeducational. VMI's single-sex admissions policy *is* "necessary to reach . . . [VMI's] educational goals," 458 U.S. at 731, and *Hogan* therefore requires rejection of the court of appeals' liability determination.

The invalidity of the court of appeals' liability determination is also evident from the mode of analysis followed by the Court in *Hogan*. The *Hogan* Court conducted a careful and detailed analysis of the proffered state objective and the relationship between that objective and the challenged classification. *See* 458 U.S. at 727-31. That analysis would have been wholly superfluous, however, if the absence of any state-provided single-sex educational opportunity for the excluded gender was *itself* sufficient to render the challenged admissions policy unconstitutional. Under the approach followed by the court of appeals in this case, the opinion in *Hogan* could have ended with its first footnote, which observed that "Mississippi maintains no other single-sex public university or college." *Id.* at 720 n.1. That the *Hogan* Court instead evaluated the legitimacy of the challenged single-sex admissions policy *without regard to the absence of an analogous single-sex program for members of the excluded gender* demonstrates the fallacy of the court of appeals' approach to the liability issue here.[17]

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[17]It is clear that the *Hogan* Court's refusal to require dual single-sex programs was not a mere oversight. Indeed, the court of appeals' opinion in *Hogan* had relied on that very reasoning, holding that "the fact that the state does not maintain a corresponding all-male nursing school deprives it of law as well as logic to support its argument that it is not discriminating between, or that it is affording equal protection to, the sexes." *Hogan v. Mississippi Univ. for Women*, 646 F.2d 1116, 1119 (5th Cir. 1981). Given that explicit statement

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If left uncorrected, the effect of the court of appeals' new test for liability will be to preclude States from offering the option of single-sex education to students of one gender unless a "substantively comparable" single-sex educational opportunity is offered to students of the other gender, regardless of the need or demand for such a program or the other educational opportunities available to that gender. Such a blow to single-sex education could well be devastating, doubly so because it would come at a time when educators and policymakers are turning more and more frequently to single-sex education as one solution for some of the ills that beset the Nation's public education system.

In Detroit, for example, the public school system sought to create all-male academies to respond to the special needs of inner-city boys, who consistently scored lower on standardized reading and math tests and had far more disciplinary problems than girls. *See* Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 Harv. L. Rev. 1741, 1743 (1992). That approach was supported by the findings of multiple educational researchers who have documented the benefits of single-sex education at the primary and secondary school levels as well as in college, and offered exciting possibilities for improving the dire status of public education in the inner cities.[18] Applying logic similar to that

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in the Fifth Circuit's opinion, this Court's refusal to adopt that reasoning in *Hogan* is highly significant.

[18]*See* Mikyong Kim & Rodolfo Alvarez, *Women-Only Colleges: Some Unanticipated Consequences*, 66 J. HIGHER EDUC. 640, 661-62 (Nov./Dec. 1995); Richard Hawley, *A Case For Boys' Schools*, *in* SINGLE-SEX SCHOOLING: PROPONENTS SPEAK, A SPECIAL REPORT FROM THE OFFICE OF EDUCATIONAL

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used by the court of appeals in this case, however, a federal district court judge preliminarily enjoined the academies on the ground that they discriminated against girls, and the school district dropped the program rather than expend its scarce resources on costly litigation. *See Garrett v. Board of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991).

Despite the fate of the Detroit experiment, school districts in Maine, California, Maryland, and other locations across the nation are seeking to take advantage of the special benefits offered by single-sex education for some students and in some contexts.[19] Indeed, as part of its commitment

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RESEARCH & IMPROVEMENT, U.S. DEP'T OF EDUC. (Debra Hollinger & Rebecca Adamson, eds.) (hereinafter "DOE REPORT") 11, 11 (1992); Cornelius Riordan, *The Case For Single-Sex Schools, in* DOE REPORT 47, 48; Valerie E. Lee & Anthony S. Bryk, *Effects of Single-Sex Secondary Schools on Student Achievement and Attitudes*, 78 J. EDUC. PSYCH. 381, 393-94 (1986).

[19] *See, e.g.*, AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., GROWING SMART: WHAT'S WORKING FOR GIRLS IN SCHOOL, EXECUTIVE SUMMARY AND ACTION GUIDE at 10 (1995) (classes separating girls and boys are now used in Virginia, New Hampshire, Illinois, New York, and California); Eric Wee, *A Lesson in Confidence: Va. Middle School Tries All-Girl Classes*, WASH. POST, May 1, 1995, at A1 (discussing all-girl classes in Manassas, Virginia; Ventura, California; and at Presque Isle High School in northern Maine); Ron Russell & John Wilson, *32 Girls + Science = Success*, DET. NEWS, July 18, 1995, at D1 (girls-only ninth grade physical science classes in Michigan public school); *Single-Sex Math Class Gaining In Popularity*, PHOENIX GAZETTE, Nov. 5, 1994, at A18 (Portsmouth, New Hampshire, school board initiating separate high school classes for boys and girls); Tim Poor, *Schools Try Same-Sex Classrooms*, ST. LOUIS POST-DISPATCH, Aug. 7, 1994, at 1A (boys and girls in grades 1-5

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to single-sex education, Virginia's General Assembly recently enacted a statute authorizing local school boards to offer single-sex classes in the Commonwealth's public schools. *See* Va. Code § 22.1-212.1:1. School districts have already responded by seeking to use single-sex classes in areas where educators believe they may be most beneficial. For example, Virginia's Prince William County is experimenting with all-girl math classes in order to increase the success rate, skills, confidence, and number of female math students.[20] These creative and laudable efforts to improve public education and respond to individualized and varied needs could well be precluded or hindered under the court of appeals' logic, with the result that the benefits of single-sex education will be limited to those relatively few students whose parents are able and willing to afford a private school education.

Likewise, the liability ruling below would preclude Virginia or any other State from offering a program like VWIL in the absence of a parallel single-sex program for men, even if there were a strong basis in fact for believing that the need and demand for a VWIL-like program was far greater than that for an analogous program for men. Indeed, under this Court's decision in *Norwood v. Harrison*, 413 U.S. 455 (1973), the state and federal governments could even be barred from providing financial or other assistance to women students attending *private* single-sex institutions, at least in the absence of proof that the private single-sex opportunities available to each gender were "substantively comparable." Such proof would be

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have separate classes in Baltimore, Maryland public school).

[20] *See* Wee, *supra* note 19, at A1.

virtually impossible to obtain in most States, given that there are only a handful of private men's colleges in the entire country.[21]

Finally, the reasoning of the court below will surely inhibit any State program, whether educational or not, that focuses on the particular needs of men or women. For example, a program designed to address the effects of domestic violence or pornography on women would be suspect in the absence of a comparable program for men, even if the available evidence clearly demonstrated that these effects are generally quite different for men and women. Battered women's shelters and other programs could be rendered unconstitutional in the absence of parallel programs for the opposite gender, even in the absence of any substantial need for such parallel programs. And even if the public resources could be found to fund these parallel programs, there would be no way to avoid constant litigation and judicial scrutiny regarding the comparability of the benefits being afforded to each gender.

For all these reasons, the court of appeals' liability determination is wrong under *Hogan* and will yield highly unfortunate consequences if it is allowed to stand. This Court should therefore reject the ruling on liability below.

[21]At the time of the liability trial, there were five private men's colleges in the United States: Morehouse College, Rose-Hulman Institute of Technology, Hampden-Sydney College, Wabash College, and Deep Spring College (a two-year college). Stips. 44 (I JA 89; L. 71). Rose-Hulman became coeducational this year.

B. The Equal Protection Clause Does Not Require Creation Of Parallel Single-Sex Programs In The Absence Of Significant Demand Where The Overall Educational Opportunities Available To Each Gender Are Equivalent

Even if *Hogan* could be read to require justification for the absence of a parallel program for the gender not afforded access to a single-sex program, that burden was satisfied in this case. The courts below found that a separate women's program identical to VMI would be both pedagogically and financially impracticable because relatively few women would be interested in such a program. Pet. App. 27a, 73a, 75a. This fact, together with the extensive and diverse educational opportunities for women in Virginia and the prominence of female students in both publicly supported colleges and in private single-sex colleges in Virginia, satisfies any concern over whether educational resources are being deployed fairly and equitably in the Commonwealth.

Based on West Point's experience in recruiting for its non-adversative, coeducational program, the district court concluded (Pet. App. 174a) that "some women" might want to attend a *coeducational* VMI (with the modifications to the educational program entailed by coeducation). The court made no such finding, however, with respect to a single-sex adversative program for women adhering to the VMI model. To the contrary, the district court found that the evidence demonstrates little, if any, meaningful demand for such a program. *See* Pet. App. 73a, 75a & n.12.[22]

[22]For example, Dr. Richard C. Richardson, an expert in higher education and the development of educational programs who chaired the most recent accreditation team for West Point, testified that, based on his interviews with female VPI cadets and on West Point's experience with female applicants, the

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Indeed, although there have been numerous women's colleges in the United States, there has never been *any* type of all-female military college in this country, let alone a women's military college based on the adversative model. Stips. 44 (I JA 89; L. 71). In fact, the record establishes that there is relatively little demand among women even for *non*-adversative residential ROTC programs in a military setting. In 1990, for example, only 44 women participated in VPI's coeducational Corps of Cadets, a tiny fraction of the more than 93,000 women college students in Virginia; fewer than 250 women were enrolled in residential ROTC military programs in the entire Nation. I DX 62L (I JA 1788; L. 233); *see also* II DX 88 (II JA 274; L. 344).

The court of appeals also concluded that the Government did not rebut cross-petitioners' showing that "if the state were to establish a women's VMI-type program, the program would attract an insufficient number of participants to make the program work." Pet. App. 27a. In the absence of meaningful demand, it would be pointless to insist that VMI be permitted to exist only if the State could show that a virtually identical program existed for women. As this Court observed in *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981), the Constitution does not require government to "engage in gestures of superficial equality." Rather, it requires only that government "treat similarly situated persons similarly." Women and men -- because of

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number of women students interested in a mirror-image VMI program "over a three or four-year period . . . could not possibly exceed 25 to 30 students." II Tr. 606, 613-15 (II JA 736, 742-44). With an institution of that size, of course, duplication of the VMI experience "was simply not possible." II Tr. 615 (II JA 745).

the vastly different extent to which they seek a VMI-like educational experience as opposed to other educational options -- are simply not "similarly situated" with respect to that type of education.

The Commonwealth's policy of providing single-sex college education and the VMI method for VMI's male students must also be evaluated in the context of the range of educational opportunities and public financial assistance afforded to women in Virginia's higher education system. A wide array of educational opportunities are available to women at Virginia's 14 coeducational public undergraduate institutions, including the opportunity to obtain degrees in all of the subjects offered at VMI (and more), and to participate in a coeducational residential Corps of Cadets and ROTC program at VPI. Indeed, substantially more women than men enjoy the benefits of the Commonwealth's public system of higher education. Pet. App. 187a.[23]

Moreover, analysis of the educational opportunities for women in Virginia would be incomplete without consideration of private colleges and universities that receive some form of direct or indirect assistance from Virginia. The Commonwealth's policy is that "'[h]igher education resources should be viewed as a whole -- public and private,'" and "Virginia relies on its independent institutions [of higher education] to offer students choices and meet the educational needs of people in the Commonwealth." Pet.

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[23] According to recent data published by the U.S. Department of Education, 83,395 women and 74,918 men were enrolled as full-time students in Virginia's public institutions of higher education in the Fall of 1991; the corresponding numbers for part-time students were 81,745 women and 58,049 men. *See* U.S. DEP'T OF EDUC., NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 195 (1994). Preliminary data reveal similar results for 1992. *Id.*

App. 191a; *see* Stips. 26, 28-32 (I JA 71, 73-77; L. 53, 55-59); *supra* pp. 7-8.

As noted above, there are four private four-year women's colleges (and only one private men's college) in Virginia, and students at each of these women's colleges have the option of participating in an ROTC program. The Commonwealth provides substantial financial assistance to its female residents who choose to attend one of these private women's colleges. *Supra* pp. 8-9; Pet. App. 190a-91a.[24] And women take advantage of these opportunities to a far greater extent than men. In the Fall of 1989, for example, 3850 women, but only 944 men, were enrolled in private single-sex institutions in Virginia. Pet. App. 189a. Thus, women have a *greater* range of single-sex educational options in Virginia than men, and VMI helps fill a gap created by the private sector's failure to provide greater or more attractive single-sex opportunities for male college students. In effect, VMI's males-only admissions policy "serves to roughly 'equalize'" overall single-sex educational opportunities in Virginia for men and women, *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 473 (1981) (plurality opinion), and it is permissible for that reason as well.

CONCLUSION

Virginia's higher education system consists of a wide array of educational choices. The predominant segment of this system is coeducational, including an excellent and demanding coeducational Corps of Cadets program at VPI. A

[24]By the same token, VMI derives most of its income from sources other than state appropriations. In the 1991-92 school year, for example, VMI derived less than 31% of its total operating budget from state appropriations, grants, and contracts. *See* II DX 21.

number of single-sex options for women also exist, with various forms of public financial assistance, at Virginia's several outstanding private women's colleges. VMI, which is publicly supported, but which also receives substantial private support, offers a valuable and effective single-sex educational option for men. Since its program has been proven to be highly effective in educating some young men and can only be provided in a single-sex environment, VMI's single-sex admissions policy is substantially related to the achievement of established and important governmental objectives. VMI's single-sex admissions policy therefore does not violate the Equal Protection Clause. Accordingly, the court of appeals' finding of liability should be rejected, and the judgment below should be affirmed on that ground.

Respectfully submitted.

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November 16, 1995

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QUESTION PRESENTED

Whether the Equal Protection Clause permits a State, as one alternative in a primarily coeducational system of higher education, to afford its citizens the option of receiving the acknowledged benefits of single-sex education through methodologies designed by professional educators to accomplish optimal and substantively comparable pedagogical results for both women and men.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1941

UNITED STATES OF AMERICA
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,
Respondents.

No. 94-2107

COMMONWEALTH OF VIRGINIA, *et al.*,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA
Cross-Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR THE RESPONDENTS

Respondents respectfully submit this brief in response to the brief for the petitioner in No. 94-1941.

INTRODUCTION

In addition to 14 diverse coeducational colleges and universities, the Commonwealth of Virginia offers students of either gender the opportunity to enroll in a public single-sex college program that is designed by experts in education to develop leadership and character through a comprehensive system of curricular and co-curricular activities including military training. Male students are offered this opportunity through the Virginia Military Institute (VMI), an his-

torically all-male undergraduate institution; female students are offered this opportunity through the Virginia Women's Institute for Leadership (VWIL), a state-supported program at Mary Baldwin College (MBC), an historically all-female private college. The question addressed in this brief is whether the Equal Protection Clause permits the Commonwealth to offer this combination of coeducational and single-sex educational opportunities for men and women.

STATEMENT

Petitioner's opening brief in No. 94-1941 presents an incomplete picture of the VWIL program and glosses over or contradicts crucial facts found by the courts below. This brief sets forth a more accurate and representative statement of the record and the remedial proceedings below.[1]

A. Mary Baldwin College

Mary Baldwin College (MBC), an historically women's college, was founded in 1842. MBC has responded to the changing role of women in society by expanding its curriculum "to include the new options open to women in business and the professions." Pet. App. 122a. MBC has "developed an emphasis on career planning," has "computerized the campus," and has added "new state of the art equipment for its science labs." *Id.* at 122a-23a. MBC "is committed to the education of women for a world of expanding opportunity." *Id.* at 122a.

MBC enrolls over 700 residential undergraduate students, has a Phi Beta Kappa chapter, is accredited by the Southern Association of Colleges and Schools, and is now ranked

[1] In their opening brief as cross-petitioners in No. 94-2107 (Va. Br.), respondents set forth the facts concerning Virginia's system of higher education and the educational program offered at VMI. *See* Va. Br. 5-14.

first among regional liberal arts colleges in the South. *See* U.S. News & World Rep. 141 (Sept. 18, 1995); *see also* II DX 125 at 123. MBC's 55-acre campus in Staunton, Virginia, includes the facilities of the former Staunton Military Academy, residence halls, classroom buildings, computer and science laboratories, a 40,000-square-foot physical education facility, playing fields, tennis courts, and a swimming pool. Pet. App. 123a, 126a-29a.

The student-faculty ratio in MBC's residential program is 11 to 1. MBC offers 28 undergraduate majors, including degrees in mathematics, the sciences, business, and the arts, and also offers pre-law and pre-med programs and a joint-degree engineering program with the University of Virginia. 94-1941 Br. in Opp. App. (Opp. App.) 17a, 19a-23a; Pet. App. 123a-24a. MBC is "geared in the direction of trying to encourage women to persist in math and physics." *Id.* at 126a.

MBC enjoys "a record of success in developing new programs and operating distinctive and unique programs within the larger traditional undergraduate residential community." Pet. App. 125a. For example, MBC has successfully established a unique residential baccalaureate program for academically gifted, high-school-age students tailored to "the academic, emotional and developmental needs of young women." *Id.* at 126a.

B. The Virginia Women's Institute For Leadership

1. Development of the VWIL Program

After the initial decision of the court of appeals in this case, the Commonwealth consulted with education experts regarding the concept of a program for women parallel to VMI and then asked MBC to develop a publicly funded single-sex college leadership program with military training designed to accomplish the same results for women that VMI achieves for men. In 1993, MBC established a Task

Force to design a college program for women that "would prepare them for leadership positions in civilian and military life." Pet. App. 101a, 102a. The members of the Task Force, most of whom are experts in women's education at the college level, were appointed by Dr. Cynthia H. Tyson, President of MBC and herself an expert in single-sex education for women and in women's leadership and educational development. *Id.* at 63a, 93a, 102a.[2]

The Task Force was co-chaired by Dr. James D. Lott, Dean of MBC and an expert in single-sex education and leadership education for women, and by Dr. Heather Anne Wilson, Dean of Students at MBC and an expert in the psychological, social, emotional, and intellectual development of college women. Pet. App. 63a, 91a, 94a, 102a.[3] The

[2]Petitioner's assertion (U.S. Br. 8) that the Task Force was "selected by respondents" is, quite simply, false. Pet. App. 102a; II Tr. 76.

[3]Petitioner denigrates the testimony of Dr. Wilson, suggesting (U.S. Br. 9 n.4) that her conclusions were based solely on the year she spent as a sorority advisor. *See* II DX 123. In fact, however, Dr. Wilson has a doctorate in higher education as well as master's degrees in counseling and in institutional planning and research, and she has more than 20 years of experience in higher education at both coeducational and women's institutions, including experience developing leadership programs for women. Pet. App. 94a-95a; II Tr. 326-28, 333 (II JA 584-86, 591). Her testimony covered far more ground than the brief aside quoted out of context by petitioner, and was based on the totality of her extensive and varied experience in higher education. II Tr. 324-58. Petitioner's demeaning caricature will come as no surprise to Dr. Wilson; petitioner's attempt to portray the VWIL program as based on invalid stereotypes was the charge she "f[ou]nd most offen[sive]. Between us, Dr. Tyson and Dean Lott and I have over 70 years of experience in advancing young women. We are not the sort of people who deal in stereotypes." II Tr. 342 (II JA 600).

Task Force included MBC faculty, administration, and student representatives. Pet. App. 102a-03a.

The Task Force "made an in-depth study of the published literature on the developmental psychology of women and the cognitive development of women" and "consulted outside experts" in addition to drawing on its own extensive collective experience in women's education. Pet. App. 63a, 103a. The Task Force was assisted by Dr. Richard C. Richardson, Jr., Professor of Educational Leadership and Policy Studies at Arizona State University, an expert in higher education and in the development of academic co-curricular programs. Pet. App. 63a, 91a-92a. Dr. Richardson has chaired 25 college accreditation teams, including the team that most recently evaluated the United States Military Academy at West Point. *Id.* at 92a.

The Task Force conducted "a detailed study of the appropriate methods by which the leadership program should be structured." Pet. App. 63a. Its members reviewed materials from VMI, met with their counterparts at VMI, examined "the VMI methodology and outcomes," and "observed VMI's holistic education" on visits to VMI. *Id.* at 104a; II Tr. 84-85, 87, 92 (II JA 430-31, 433, 438).[4] The Task Force "considered carefully, in light of their collective experience and the literature on women's education, where VWIL should follow or depart from the VMI methodology to produce the same outcomes." Pet. App. 104a. After detailed study, the Task Force concluded that VWIL should embody challenge in all parts of its program but that the optimal methods "for educating and training most women for leadership roles" in a single-sex college environment do

[4]Thus, petitioner is incorrect in asserting (U.S. Br. 8) that the "Task Force did not consult anyone at VMI in planning the curriculum."

not include certain aspects of the VMI system. *Id.* at 63a.

The Task Force's goal was to create the best system for educating the young women who would attend VWIL, not blindly to copy every aspect of VMI's program. As Dr. Richardson explained, "the 'adversative' educational model has never been advanced by anyone as an appropriate paradigm for optimizing the development of women." II DX 11K at 4 (L. 308). Indeed, that system's inappropriateness "is evident from its abandonment or substantial modification in such military settings as the federal military academies and Virginia [Polytechnic] following coeducation." *Id.* The Task Force found

> no evidence that an extreme adversative environment . . . is appropriate for young women; we do find solid evidence, however, that an organized and disciplined environment which has as its purpose the building up of self confidence through mastery of physical, intellectual, and experiential challenges, *is* appropriate, is in fact the optimum environment for the education and training of women leaders.

II DX 39 at 3-4 (L. 329-30). The Task Force's members found little or no demand for a women's program identical to VMI. II Tr. 127, 340-41 (II JA 473, 598-99).

While it would have been "'easier to design'" the VWIL program to resemble VMI more closely, MBC determined that such a program would have had "'no real prospect of successful implementation.'" Pet. App. 11a. MBC felt that it would have been "'professionally irresponsible to compromise student welfare by designing a program to meet litigation objectives instead of student needs.'" *Id.*

Accordingly, the Task Force designed VWIL to develop women leaders through use of a "method which reinforces

self-esteem rather than the leveling process used by VMI." Pet. App. 64a.[5] The VWIL program is analogous to "the holistic VMI program, bringing together the co-curricular and the curricular to promote the student's development in all phases of her life." *Id.* at 63a. That program has been successfully implemented, and more than 40 women are presently enjoying the educational benefits of the VWIL program as its first-year class. TSR at 2.[6]

2. Description of the VWIL Program

VWIL offers women students the opportunity to obtain a single-sex undergraduate education with military training in an integrated program designed "to produce 'citizen-soldiers who are educated and honorable women, prepared for the varied work of civil life, qualified to serve in the armed forces, imbued with love of learning, confident in the functions and attitudes of leadership, and possessing a high sense of public service.'" Pet. App. 107a. Like VMI, VWIL offers an integrated and "highly structured program" that combines "the co-curricular and the curricular to promote the student's development in all phases of her life" and that pursues "the same five goals as those pursued at

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[5]Petitioner misleadingly implies that VWIL was designed to reflect "*respondents'* views of 'the differences and the needs of college-age men and women.'" U.S. Br. 8 (emphasis added). Nothing could be further from the truth. As the evidence and findings below clearly show, respondents did not dictate or control the design of the VWIL program. VWIL was designed by experts in single-sex education from MBC and elsewhere, not by the Commonwealth or VMI. It embodies those *experts'* views of the best methodology for developing the leadership skills of women college students in a single-sex environment.

[6]"TSR" refers to Defendants' Third Status Report, which was filed in the district court on October 31, 1995. Ten copies of that document have been lodged with the Court.

VMI: education, military training, mental and physical discipline, character development, and leadership development." *Id.* at 8a, 63a, 103a-04a. MBC is committed to making VWIL work and will make improvements as necessary to ensure the program's continued success. *Id.* at 30a, 106a; Opp. App. 13a-14a; II Tr. 1528-30 (II JA 1078-80).

As part of the VWIL program, students must demonstrate computer and foreign language proficiency and complete courses in calculus, statistics, and laboratory sciences. In addition, they must complete an extensive leadership development program including an externship and laboratory and speaker activities. *Id.* at 9a, 64a-65a, 108a-09a.[7]

As at VMI, VWIL's co-curricular offerings combine with the academic curriculum to create a comprehensive leadership-building experience. Women enrolled in VWIL are required to complete four years of ROTC, which is now offered through cross-enrollment agreements between MBC and the ROTC units at VMI.[8] VWIL students use the same ROTC curriculum, methods, and physical training and evaluation activities, and receive the same leadership training and military career opportunities, as all other ROTC students. Opp. App. 12a-13a; Pet. App. 67a, 109a, 116a-17a. VWIL students also constitute a corps of cadets, wear uniforms, receive military drill and ceremony training, and

[7]MBC offers VWIL students a variety of science and mathematics majors as well as an opportunity to obtain a state-supported degree in engineering through a dual degree program with the nearby University of Virginia. *See supra* p.3.

[8]Petitioner incorrectly suggests (U.S. Br. 9-10 & n.6) that VWIL students will participate in the "Mary Baldwin ROTC program" that existed, with little student participation, prior to the creation of VWIL. Instead of that Army ROTC unit, VWIL students select from the same Air Force, Navy/Marine Corps, and Army ROTC units offered to VMI students.

participate in the Virginia Corps of Cadets, which consists of all VWIL, VMI, and Virginia Polytechnic Institute and State University (VPI) cadets. *Id.* at 110a; Opp. App. 13a. A chain of command has been established within VWIL, and each upperclass VWIL student will be assigned a military rank. Pet. App. 110a; TSR at 5 and Exh. 6.[9]

VWIL students are required to complete eight semesters of physical and health education, including self-defense and an advanced fitness course designed especially for VWIL students. Pet. App. 111a. They take a strength and endurance test each semester based on the national military standards for women, and must take additional physical training until they have passed the test. TSR at 5. They receive special "training in self-defense and self-assertiveness" as part of a Leadership Challenge Program that is mandatory for all freshman VWIL students except those participating in varsity sports and is "designed to be analogous to the VMI 'rat challenge'" physical fitness program. *Id.* at Exh. 5; Pet. App. 112a. VWIL's physical training program "is based on the VMI physical education program" and "is designed to be comparable in rigor and challenge to the physical training test for men at VMI." *Id.*[10] VWIL's physical training component "will produce women who are capable of serving physically in the military service." *Id.* at 113a.

Before the start of their freshman year, VWIL students (like VMI students) participate in a special "cadre week

[9]Thus, petitioner errs in asserting (U.S. Br. 9-10) that "VWIL would provide no military framework or training other than the Mary Baldwin ROTC program."

[10]In addition to MBC's physical education facilities, VWIL students have access to VMI's facilities for various activities. Pet. App. 113a; *see* TSR at Exh. 5.

orientation" designed to provide "a physically and mentally demanding experience which will foster bonding and which will be a paradigm for VWIL itself." Pet. App. 110a, 114a. This year's program included physical training, ROTC orientation, training in military drill and ceremonies, and a 4-day wilderness orientation. TSR at 3.

Freshmen VWIL students room together in freshman residence halls and are subject to a variety of regulations, including room and uniform inspections and mandatory study periods. Pet. App. 114a; TSR at 4, 6-7. "[T]he VWIL program will use the highly disciplined schedule of the VMI model." Pet. App. 66a-67a, 114a. After their freshman year, VWIL students are required to live for at least one year in the VWIL House, which is the center for VWIL meetings and activities. *Id.* at 115a-16a.

Upperclass VWIL students will serve as mentors for incoming VWIL students. Pet. App. 115a.[11] In addition, upperclass students will play an important role in orienting incoming students, enforcing rules and regulations, teaching VWIL standards and expectations, organizing and directing drills, and leading the VWIL Corps. *Id.* at 115a-16a.[12] VWIL students are subject to MBC's honor code, which (like VMI's honor code) proscribes lying, cheating, stealing, and failure to report any of those infractions. *Id.*

[11]Petitioner asserts (U.S. Br. 11) that VWIL will not use VMI's mentoring system (known as the "dyke" system, *see* Pet. App. 196a-97a, in reference to the cross-belted dress uniforms worn by VMI students, *see* I Tr. 142 (I JA 390)), but petitioner cannot identify any meaningful difference in the goals of these two mentoring programs.

[12]Thus, contrary to petitioner's assertion (U.S. Br. 11), upperclass VWIL students will have expanded leadership roles and organizational duties similar to those given to upperclass VMI students through VMI's "class" system. *See* Pet. App. 196a.

at 114a-15a; II Tr. 1526 (II JA 1076); II DX 82 at 24.

Both the Commonwealth and VMI have provided extensive financial and other support for the development and implementation of VWIL, and they and MBC are committed to the program's continued success. Pet. App. 68a, 81a-83a, 102a-06a. The Commonwealth has expressed "unambiguous and unequivocal support of single-sex education for men and women," and the highest-ranking Virginia officials "have strongly supported VWIL." *Id.* at 81a, 83a. Virginia's General Assembly has enacted legislation mandating equal funding on a per-student basis for VWIL and VMI, without any limit on the maximum number of VWIL students. *Id.* at 10a, 80a & nn. 18-19; Opp. App. 12a.

VMI has cooperated extensively in the development and implementation of VWIL, and "has committed to support the VWIL program." Pet. App. 102a, 105a. VMI and MBC have formed a joint leadership education advisory board that will monitor the outcomes of the two programs. *Id.* at 105a; Opp. App. 6a, 14a; *see also id.* at 17a, 24a-26a. The VMI Foundation has provided substantial financial support for VWIL and is committed to providing an additional $5.5 million endowment once final court approval has been obtained. Pet. App. 120a; Opp. App. 6a-7a, 12a.

VMI is providing VWIL with full access to and support from its alumni network. VMI alumni and admissions personnel assist in recruiting for VWIL. Pet. App. 120a-21a; Opp. App. 3a, 5a, 10a, 14a. The VMI Alumni Association has opened its placement services and networks to VWIL, will assist VWIL students in obtaining leadership externships, and has begun to develop joint alumni networking opportunities with MBC. *Id.* at 6a; Pet. App. 120a-21a. VMI's alumni are "extremely supportive" of VWIL and are "committed to making [it] work." *Id.* at 121a.

C. The District Court's Remedial Decision

After a trial, the district court found that the single-sex programs at VWIL and VMI comply with the Equal Protection Clause. Rejecting petitioner's argument that Virginia was required to provide an exact replica of VMI for women despite the contrary recommendations of experienced educators, the court expressly found that "VWIL is a good design for producing female citizen-soldiers" and that "the differences between VWIL and VMI are justified pedagogically and are not based on stereotyping." Pet. App. 67a, 76a. In support of these findings, the court relied upon expert testimony that "the VWIL approach towards educating and preparing women leaders was preferable to the VMI approach" and indeed that "the demand for an all-women's VMI would be so small as to make the project unfeasible," whereas "there would be much more significant demand for VWIL." *Id.* at 73a, 75a & n.12.

The court relied on the testimony of Dr. Elizabeth Fox-Genovese, "one of the leading experts on the educating of women," who testified that "an adversative method of teaching in an all-female school would be not only inappropriate for most women, but counter-productive," because it would be destructive of women's self-confidence. Pet. App. 64a, 74a. Petitioner did not offer the testimony of *any* experts in single-sex education to refute this testimony. Moreover, the court expressly rejected the testimony of petitioner's expert in psychology, who asserted that the differences in methodology at VMI and VWIL were based on stereotypes. The court explained that this expert's "testimony was contradicted by most of the evidence in the record." *Id.* at 72a-73a. Indeed, even this expert acknowledged that there were developmental differences between college-age men and women and that women would "have more chances for leadership at single-sex institutions." *Id.*; II Tr. 914, 916, 918-19 (II JA 869, 871, 873-74).

The district court also found that the evidence "supplies a reasonable basis for predicting [VWIL's] success in attaining its stated goals" of producing citizen-soldiers well prepared for leadership roles in civilian and military life. Pet. App. 83a. Based on the experts' conclusions that "the methods adopted for the VWIL will produce the same or similar outcome for women that VMI produces for men" (*id.* at 64a) and that "VWIL will produce the kind of self-assurance in the face of accomplishment of difficulties that VMI offers" (*id.* at 75a-76a), the district court rejected petitioner's argument that the Constitution requires that single-sex institutions be identical in every respect. Instead, the court held that VWIL remedied any constitutional violation because it "will achieve substantially similar outcomes in an all-female environment and . . . there is a legitimate pedagogical basis for the different means employed to achieve the substantially similar ends." *Id.* at 76a.

D. The Court of Appeals' Remedial Decision

The court of appeals affirmed. In addition to the two-pronged test of *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), the court applied a third requirement, which entails "carefully weighing the alternatives available to members of each gender denied benefits by the classification" in order to determine whether those alternatives are "substantively comparable." Pet. App. 17a.[13]

Turning to the first prong of the *Hogan* test, the court reaffirmed the district court's factual finding that "single-gender education at the college level is beneficial to both

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[13]Petitioner appears to argue (U.S. Br. 13) that the court of appeals failed to apply the two prongs of the test enunciated in *Hogan*, but the court of appeals made clear that its analysis included both prongs of that test. *Compare* Pet. App. 16a *with* 458 U.S. at 724.

sexes," and concluded that offering "single-gender education as one particular pedagogical technique among many" is "a legitimate and important governmental objective." Pet. App. 20a, 21a. The court next held that the Commonwealth's decision to provide single-sex education through VMI and VWIL was directly related to the Commonwealth's legitimate and important objectives, because "the only way to realize the benefits of homogeneity of gender is to limit admission to one gender." *Id.* at 22a. In addition, the court found that "single-gender education at VMI is also directly related to achieving the results of" the VMI system, because essential "'characteristics of VMI's program'" were incompatible with a coeducational environment. *Id.* at 6a-7a, 23a.[14]

The court also concluded that the benefits offered by VMI and VWIL were "substantively comparable." Pet. App. 24a-28a. After scrutinizing the two programs, the court found that "the mission and goals are the same, and the methodologies for attaining the goals, while different, nevertheless are reasonably calculated to succeed at each institution." *Id.* at 27a. The differences in the two programs are justified because they are "attributable to a professional judgment of how best to provide the same opportunity." *Id.* at 26a. Indeed, as the court explained, providing women with a program identical to VMI would not be consistent with reasoned educational theory and experience, because "[e]ducational experts" believed that many women "may not respond similarly" to an adversative approach and that a women's program identical to VMI "would attract an insufficient number of participants to make the program work." Pet. App. 27a.

[14]Petitioner suggests (U.S. Br. 14, 29-30) that this conclusion was predicated on the court's remark that direct cross-sex harassment in an adversative setting would destroy "'any sense of decency that still permeates the relationship between the sexes.'" In fact, however, this conclusion was based on and supported by extensive evidence and findings from the liability phase of the case which demonstrated conclusively that VMI's method would have to be changed substantially if it were to be implemented in a coeducational setting, thus precluding any student from obtaining the benefits derived from that method. Pet. App. 6a-7a; Va. Br. 16-19, 34-36; *see infra* pp. 43-47.

The court of appeals accordingly upheld the remedy approved by the district court. In order to ensure the effective and successful implementation of VWIL, the court remanded the case to the district court with instructions to oversee the remedy. Pet. App. 30a.

SUMMARY OF ARGUMENT

The fundamental question presented in this case is whether a State may offer the option of single-sex education to both men and women as part of a diverse and primarily coeducational system of higher education. It is an established and unchallenged fact in this case that single-sex education offers substantial pedagogical advantages to many young men and women. Both VMI and VWIL therefore advance important and legitimate state objectives by offering college students of both genders a comparable opportunity to obtain an affordable single-sex education in a program emphasizing leadership and character development.

It is also an established fact that VWIL and VMI offer comparable educational benefits to their respective students. VWIL and VMI are each designed to achieve the same goals and use similar methods to achieve those goals. Both programs offer leadership and character development through an interconnected system of curricular and co-curricular activities including challenging course requirements, a rigorous physical fitness program, extensive military training through ROTC, a disciplined schedule, a mentoring program, an honor code, and a system of increasing re-

sponsibilities and leadership roles for upperclass students. Both combine these attributes with the proven benefits of a single-sex residential setting to provide an environment for the development of leadership and character.

The only differences between VMI's and VWIL's programs reflect the considered judgments of professional educators as to the most effective methods for educating their respective students. VWIL's design is based on observable psychological and sociological norms that even petitioner's experts conceded are real, not on archaic or harmful stereotypes of the type condemned in this Court's cases. The differences in technique between VMI and VWIL are directly attributable to a reasoned analysis of modern scholarship and professional determinations regarding the most successful techniques for educating women college students for leadership roles in modern society. Moreover, it was established below that there is insufficient demand among women college students for a precise replication of the VMI methodology, so the differences between VWIL and VMI are independently justified by the need to attract a student body large enough for the program to be effective.

VMI and VWIL do not foster or perpetuate impermissible and outmoded stereotypes about women's role in society. To the contrary, VWIL and VMI together reflect the conviction that women and men are equally well suited for leadership roles in all walks of life, and VWIL's graduates will be every bit as qualified as VMI's to assume leadership positions in the military and elsewhere. Indeed, it is stereotypical to presume that a women's single-sex college program must mimic every aspect of VMI to be successful. Thus, Virginia unequivocally supports the proposition that men and women are equally capable of serving society in positions requiring tough and aggressive leaders. But Virginia also believes (and the courts below found) that single-sex education is the best means for preparing some

young people for such roles, and that professional educators -- not lawyers or judges -- should be given the discretion and academic freedom to use their expertise in designing effective and successful single-sex educational programs.

There is no merit to petitioner's argument that the single-sex admissions policies of VWIL and VMI are unconstitutional if there exists a single person who would prefer the program offered by the other institution. If petitioner were correct, there could be no public support for single-sex education at any level. Moreover, petitioner's argument is inconsistent with numerous precedents of this Court recognizing that government may classify on the basis of gender as long as the classification is "substantially related" to achieving an important governmental interest.

Coeducation is not the only permissible educational methodology for Virginia and other States. Indeed, because VWIL offers women (as VMI offers men) the benefits of single-sex education as well as the additional advantages of a rigorous leadership and character development program, petitioner's preferred remedy would be *less* effective than that provided by Virginia and approved by the courts below. Petitioner's claim that VMI could become coeducational without meaningfully changing its program is contrary to the record and findings below. The finding that VMI could not offer the benefits of its program if it were to become coeducational reflects, not impermissible stereotyping, but the reasoned conclusions of expert witnesses and the experience of other institutions demonstrating that fundamental characteristics of the VMI system would be changed dramatically in a coeducational setting. Coeducation at VMI would destroy both its single-sex nature and important elements of its adversative system, thereby eliminating diversity while offering no educational opportunity to women that is not already available elsewhere.

Petitioner's proposal that strict scrutiny should apply to

gender classifications is not properly presented. Petitioner failed to raise that question below, the courts below did not address it, and petitioner affirmatively disclaimed reliance on that standard both in this Court and in the courts below. In any event, petitioner offers no special or compelling reasons for departing from the Court's precedents in this area.

ARGUMENT

The central, though unspoken, premise of petitioner's brief is that the Constitution should be construed to forbid public single-sex education. Even while effectively conceding that single-sex educational programs offer proven and demonstrable educational benefits to many students, particularly those from disadvantaged backgrounds who are least able to afford a private education, petitioner seeks to impose on the Nation its dogmatic view that coeducation is the only permissible methodology for all public schools. Fortunately, neither precedent nor public policy supports petitioner's attempt to substitute its own preferences for the reasoned analyses and scholarly conclusions of the professional educators responsible for creating and maintaining the valuable and beneficial single-sex programs at issue in this case.

The facts of this case reveal with irresistible force the importance of preserving the ability of state and local governments to offer single-sex programs like VWIL and VMI as a complement to their primarily coeducational systems of public education. Rather than address those facts on the merits, petitioner repeatedly ignores or substitutes its own unsubstantiated opinions for the findings below on a host of issues, from the sincerity of respondents' interest in single-sex education to the impact of coeducation on the educational experience offered by VMI. It is settled law, however, that this Court will not set aside facts found by two lower federal courts. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States v. Doe*, 465 U.S. 605, 614 (1984). Petitioner's attempts to rewrite the record and findings at this stage of the case and its last-minute advocacy of a new and higher standard of review betray petitioner's apparent recognition that it cannot prevail on the actual record below or the legal standard heretofore applied by this Court to issues such as these. Petitioner's approach is contrary to this Court's settled practice and should not be permitted to succeed.

I. THE SINGLE-SEX ADMISSIONS POLICIES AT VWIL AND VMI SUBSTANTIALLY ADVANCE LEGITIMATE AND IMPORTANT GOVERNMENTAL OBJECTIVES

Under *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), a public college's single-sex admissions policy is permissible if it "serves 'important governmental objectives'" and is "'substantially related to the achievement of those objectives.'" 458 U.S. at 724. VWIL and VMI are constitutional under that standard.

The courts below found, based on modern research and extensive expert testimony, that single-sex education provides unique benefits for many college students of both sexes. *See* Va. Br. 14-15, 26-27.[15] The district court explained that "[t]he record is replete with testimony that single gender education at the undergraduate level is beneficial to both males and females." Pet. App. 167a. It found that "[b]oth men and women can benefit from a single-sex education" and that "the opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement" for some students. *Id.* at 168a, 174a, 225a-27a. The court concluded that the "virtually

[15]Even petitioner conceded below that "there is ample evidence in the record on the value of single-gender education." II Tr. 238.

uncontradicted" evidence supports "Virginia's view that substantial educational benefits flow from a single-gender environment, be it male or female, that cannot be replicated in a coeducational setting." *Id.* at 176a.

The court of appeals affirmed these findings, holding that single-sex education "provid[es] substantial benefits to college students" and "has been found to have salutary consequences for sexual equality in the job market." Pet. App. 149a. The court also found that "[t]he experts for both sides in this case appear to agree with" these conclusions. *Id.* at 150a; *see id.* at 168a, 225a. Thus, it is "a fact established in this case" that "single-gender education at the college level is beneficial to both sexes." *Id.* at 20a.

As respondents have already explained in detail, the proven benefits of single-sex education are a central and important part of the overall experience afforded to VMI's students. *See* Va. Br. 24-36; Pet. App. 61a, 148a, 227a. Indeed, both courts below concluded that "the legal justification for VMI's all-male admission policy [i]s contained in the benefits that flow from a single-sex education." *Id.* at 61a. While Virginia had historically afforded women the same opportunity to receive the benefits of single-sex education at publicly supported women's colleges and universities, Virginia's public women's colleges and universities each chose to become coeducational in recent years. *See* Va. Br. 6-7.[16] Virginia has now remedied this anomaly by creating VWIL, which (in addition to paralleling other aspects of VMI's program) replicates the benefits of VMI's single-sex educational environment by reestablishing public

[16]The Commonwealth has continued to provide financial support for women's single-sex college education through various programs of aid and assistance to Virginia's private colleges, including several women's colleges. *See* Va. Br. 8-9.

single-sex education for women in Virginia.[17]

Petitioner has never challenged directly the factual *finding* that single-sex education provides substantial pedagogical benefits for some men and women that cannot be replicated in a coeducational setting. Instead, petitioner offers only the *ipse dixit* that "[c]ontrary to the *assumption* of the court of appeals, single-sex education is not self-justifying," and contends, without any basis in fact, that respondents do not "have a genuine interest in providing single-sex education to college students in Virginia." U.S. Br. 45 n.32, 47 (emphasis added).

As respondents have demonstrated (Va. Br. 24-28), however, States have an important and legitimate interest in providing diverse and beneficial educational options to their citizens. The record and findings in this case clearly establish that single-sex education has proven benefits for many students at the college level and enhances the diversity of a State's educational offerings. Petitioner disputes none of these propositions, and thus there can be no doubt that the objective of providing the benefits of single-sex education as part of a large, diverse, and primarily coeducational system of higher education is an important and legitimate one.

It is equally clear that respondents have a genuine interest

[17]Indeed, VWIL may surpass VMI in this respect; the district court found that the benefits of a single-sex college education are, if anything, "stronger among women than among men." Pet. App. 174a. Contrary to petitioner's suggestion (U.S. Br. 46), moreover, women are not limited to the VWIL single-sex option. Virginia offers a wide menu of public coeducational opportunities at the college level, including the residential Corps of Cadets and ROTC unit at VPI, which (like VMI and VWIL) emphasizes leadership and character development and military training. Pet. App. 214a-18a; Stipulations 49-54 (I JA 94-99; L. 76-81); *see also* Va. Br. 9-10.

in achieving that objective. Petitioner's contrary argument is fully answered elsewhere (*see* Va. Br. 28-32) and in any event rests entirely on circumstances that no longer exist. Petitioner completely ignores the findings below that, in establishing VWIL, respondents have unequivocally demonstrated the genuineness of their support for single-sex education for both men and women in Virginia. The district court found as a matter of fact that "[t]he record in this case shows the Commonwealth's unambiguous and unequivocal support of single-sex education for men and women." Pet. App. 81a; *see id.* at 81a-83a & n.20. Indeed, "every person in Virginia's officialdom who has or has had the authority to affect Virginia's policies on higher education has spoken in favor of diversity by offering single-sex education to men and women of the Commonwealth." *Id.* at 83a; *see also id.* at 29a.

The single-sex admissions policies at VMI and VWIL are also substantially related to the achievement of important governmental objectives. Plainly, "the only way to realize the benefits of homogeneity of gender is to limit admission to one gender." Pet. App. 22a. Exclusion of men from VWIL and women from VMI is directly and precisely related to achieving the legitimate and important objective of providing the benefits of a public single-sex college education to the students who seek them.

The single-sex nature of the educational experience at VMI and VWIL is also central to the attainment of the additional benefits provided by those programs' specific emphasis on leadership training and development. VMI's methodology is inextricably connected to its single-sex environment (*see infra* pp. 43-47; Va. Br. 33-36), and VWIL is designed to maximize the benefits of its leadership program by capitalizing on the single-sex nature of the program. Indeed, the MBC Task Force found that, because of the need to combat cultural stereotyping, "[l]eadership development for women will be most effective . . . if it takes place in a single-sex environment of challenge and support . . . ." II DX 39 at 3 (II JA 255; L. 329).[18] Thus, the single-sex admissions policies at VWIL and VMI are substantially related to the achievement of important state objectives, and they satisfy the requirements of *Hogan*.

II. THE VWIL PROGRAM FULLY REMEDIES ANY CONSTITUTIONAL VIOLATION THAT MAY HAVE EXISTED AS A RESULT OF VMI'S SINGLE-SEX ADMISSIONS POLICY

A. VWIL Offers Educational Benefits To Women That Are Comparable To Those Provided To Men By VMI

Petitioner contends (U.S. Br. 22-23, 42-43) that VWIL does not remedy the constitutional violation found by the court of appeals because women continue to be denied the benefits of attending VMI. That contention is refuted fully by the record and findings below, which demonstrate that the ultimate benefits afforded to VWIL's students are equivalent to those received by students attending VMI.

VMI's mission is "to produce educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary." Pet. App. 203a. The courts below found that VMI accomplishes that mission by providing its students both the proven benefits of a single-sex college education and the additional benefits of VMI's educational method, which combine to produce self-discipline, confidence, character,

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[18]Even one of petitioner's experts conceded that "women have more chances for leadership at single-sex institutions" and that "men and women are treated differently in the classroom," a trend that "could be exacerbated in a co-educational environment." Pet. App. 73a & n.9.

and leadership skills for military and civilian life. Pet. App. 54a, 150a-51a, 155a, 203a-04a, 225a-27a.

VWIL was purposefully designed to provide these very same benefits to its students. Its mission is "to produce the 'citizen soldier,' *i.e.*, women who are trained for leadership in both civilian and military life," and it pursues "the same five goals as those pursued at VMI: education, military training, mental and physical discipline, character development, and leadership development." Pet. App. 8a, 63a.

The means employed by VWIL to achieve these same goals are similar in many respects to those employed by VMI, although the creators of VWIL chose not to adopt some aspects of VMI's educational method. Like VMI, VWIL emphasizes leadership and character development through an integrated and rigorous program of physical and mental challenges and leadership opportunities. Like VMI, VWIL includes military training leading to the possibility of a military career and prepares its students for positions of prominence in either civilian or military life. *See generally* Pet. App. 8a-10a, 25a-26a, 62a-64a, 67a.

VWIL's physical education regimen "is designed to be comparable in rigor and challenge to the physical training test for men at VMI," Pet. App. 112a, and is unsurpassed in the demands it imposes on women students. VWIL's co-curricular component uses "the highly disciplined schedule of the VMI model" (*id.* at 67a), and combines with the other elements of the VWIL program to provide an integrated system for the development of self-confident leaders. The VWIL program incorporates a mentoring scheme and a system of increasing authority, leadership, and responsibilities for upperclass students analogous to VMI's "dyke" and "class" systems. VWIL students are subject to an honor code and are organized along military lines to provide each student an opportunity to experience various roles in the military hierarchy. The ROTC and military career

opportunities available to VWIL students are coextensive with those for VMI's students. *See supra* pp. 8-9.[19]

Most importantly, VWIL (like VMI) affords its students the benefits of a single-sex college education. Petitioner virtually ignores this aspect of the VWIL program; petitioner's opening brief contains no recognition of the special benefits that single-sex education provides to the students who choose it. Petitioner's reluctance to acknowledge the importance of the single-sex nature of the VMI and VWIL programs, however, cannot change the crucial significance of that attribute of both programs. *See supra* Part I. Indeed, by providing women the opportunity to enroll in a publicly supported undergraduate program emphasizing leadership, military training, physical and mental rigor, and character development in a single-sex environment, VWIL provides a closer parallel to VMI's program than any co-educational school could hope to offer.

After carefully considering the design, structure, and goals of the VWIL program, the courts below found that the educational benefits provided by VWIL to its women students will be equivalent to those provided by VMI and that any differences in methodology are "attributable to a professional judgment of how best to provide the same opportunity." Pet. App. 26a, 28a, 76a, 83a. In particular, the district court found that "MBC is committed to providing to the VWIL women benefits that are equal to *or better than* the benefits provided to men at VMI," and concluded that VWIL "will achieve substantially similar outcomes in an all-female environment." *Id.* at 68a, 76a (emphasis added). This conclusion was based on the testimony of ac-

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[19] As the foregoing discussion demonstrates, petitioner is manifestly wrong when it asserts (U.S. Br. 9) that VWIL's designers "rejected every component of VMI's system."

knowledged experts in higher education who studied the VWIL program in detail. For example, Harvard University Professor David Riesman "concluded that VWIL will produce the kind of self-assurance in the face of accomplishment of difficulties that VMI offers and requires of its cadets." *Id.* at 75a-76a. Similarly, Dr. Richardson testified that VWIL will offer women "a comparable opportunity to achieve outcomes which men achieve at VMI." II Tr. 622; *accord* II DX 11K at 3 (II JA 155; L. 307). Dr. Elizabeth Fox-Genovese, "one of the leading experts on the educating of women, . . . concur[red] in th[at] assessment." Pet. App. 64a. In short, VWIL offers "an education for women equivalent in rigor, focus and outcome to that offered to men at VMI." II DX 11K at 6 (II JA 158; L. 310).

The court of appeals endorsed these conclusions. The court noted that "both VMI and VWIL are focused on results beyond simply awarding an undergraduate degree. Both seek to teach discipline and prepare students for leadership." Pet. App. 26a. Thus, "the mission and goals are the same, and the methodologies for attaining the goals, while different, nevertheless are reasonably calculated to succeed at each institution." *Id.* at 27a.[20]

Petitioner ignores these conclusions and argues (U.S. Br. 22-23) that VWIL's benefits are not comparable to VMI's because VWIL cannot offer "the benefits of association with an established and renowned institution" and its "'enormously influential'" alumni "network."[21] That con-

[20]Petitioner's experts conceded that "any given set of outcomes can be obtained by more than a single methodology." Pet. App. 68a.

[21]Petitioner also points to VMI's allegedly "powerful prestige" (U.S. Br. 20), but VMI does not enjoy the academic prestige of public coeducational institutions like the University of Virginia, the College of William and Mary, or VPI. VMI attracts

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tention overlooks the facts that MBC is a highly regarded institution in its own right with its own valuable "networks," and that VWIL's graduates *will* enjoy the benefits of access to the VMI alumni "network" as well. As noted above (*supra* p.2), MBC is one of the finest liberal arts colleges in the South. Moreover, "VWIL graduates will have the same access to the VMI placement network as VMI graduates." Pet. App. 121a; *see supra* p.11.[22]

For all the foregoing reasons, petitioner is incorrect in suggesting (U.S. Br. 46) that VMI and VWIL "are vastly different in content and in the value of the degree they offer." The record and findings below flatly contradict that assertion and demonstrate that VMI and VWIL provide comparable benefits through analogous, though not identical, single-sex educational programs designed by experts to accomplish precisely the same goals. Petitioner offers no

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"average" students, and its academic reputation is comparable to MBC's. Pet. App. 206a; II Tr. 244-45 (II JA 565-66).

[22]The Government's reliance (U.S. Br. 23) on *Sweatt v. Painter*, 339 U.S. 629 (1950), is wide of the mark. That case involved a *racial* classification, not a gender-based classification, and this Court has never applied (or even cited) *Sweatt* in a gender case. Moreover, there is (quite rightly) no suggestion in *Sweatt* that racial segregation of law students provides any meaningful or valid educational benefits, whereas the record in this case is clear that single-sex education at the college level does provide important pedagogical benefits that cannot be replicated in a coeducational setting. Finally, while VWIL itself is a new program, MBC is a respected institution with a 150-year history of successfully educating young women, and VWIL graduates will enjoy the added benefits of access to the VMI alumni network as well.

justification for ignoring these factual findings.[23]

B. The Differences Between VWIL And VMI Are Pedagogically Justified And Are Not Based On Archaic Stereotypes

VWIL was designed to provide the optimum environment for producing successful women leaders, and "[t]he methods by which this goal could be achieved were the subject of intensive study and planning by professionals who are leaders in the field of designing and implementing educational programs for women." Pet. App. 63a. VWIL's designers carefully incorporated the most persuasive and contemporary research on leadership development. Choosing to depart from certain aspects of VMI's extreme adversative method, they created an analogous, carefully tailored and rigorous program designed to achieve the same results while attracting and successfully educating a significant number of students.

The district court found that modern scholarship and research have identified "important differences between men and women in learning and developmental needs," and that these "psychological and sociological differences are real differences, not stereotypes." Pet. App. 224a, 225a. The court concluded that VWIL was carefully designed to achieve the same results as VMI by taking account of these factors. Thus, "the differences between VWIL and VMI are justified pedagogically and are not based on stereotyp-

[23]Petitioner's challenge to the adequacy of the remedy approved below also ignores the fact that district courts enjoy wide discretion in determining the proper scope of remedies for constitutional violations. This Court has "recognized that the choice of remedies to redress [equal protection violations] is 'a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court.'" *United States v. Paradise*, 480 U.S. 149, 184 (1987).

ing." *Id.* at 76a. The court of appeals agreed, explaining that "the difference [between VWIL and VMI] is attributable to a professional judgment of how best to provide the same opportunity." *Id.* at 26a.

Petitioner is unable to refute the conclusions of the experts and the factual findings of the courts below, so it simply substitutes its opinions for those findings, asserting (U.S. Br. 37-40) that every conclusion with which it disagrees is the product of impermissible stereotypes. That approach is unwarranted, for several reasons.

In the first place, neither respondents nor the courts below relied on any broad generalization that all women would prefer VWIL's methods to VMI's or that no woman could succeed in an adversative-type program. To the contrary, the MBC Task Force and respondents' experts recognized, and the district court found, that some women could succeed in, and "may" prefer, a program identical to VMI's. Pet. App. 76a; *see id.* at 8a; I Tr. 702 (I JA 949).

The expert analyses and testimony at trial demonstrated, however, that VMI's methodology would be ineffective or counterproductive for many, if not most, women college students. Pet. App. 73a-76a. The experts relied on their own years of experience and on scholarly studies demonstrating that many young women enter college with different needs than their average male counterparts in areas such as confidence and self-esteem and benefit appreciably from a challenging yet supportive single-sex college environment like that offered by the VWIL program. *Id.* at 73a-74a; II DX 130A (II JA 280-319). These experts concluded "that the VWIL approach towards educating and preparing women leaders was preferable to the VMI approach," and indeed that the VMI method would be counterproductive for, and have a "discriminatory impact on," many women students. Pet. App. 64a, 73a; II DX 11K at 4 (II JA 156).

The creators of VWIL could easily have chosen to model that program more precisely along the VMI lines, but their experience, education, study, and instincts led them to create a program that they believed would be vastly more successful in educating young women leaders in a single-sex environment. *See* Pet. App. 11a; II DX 11K at 6 (II JA 158; L. 310). The evidence, and the factual findings below, confirm the soundness of that judgment. Indeed, for VWIL's designers to have blindly and unthinkingly replicated VMI's methods would have made them guilty of precisely the sort of arbitrariness that petitioner purports to condemn. Professional educators are obviously in the best position to design and implement college programs aimed at developing successful leaders, and the results of that process in this case cannot legitimately be dismissed as stereotypical merely because they do not conform to petitioner's preconceived policy preferences.

Petitioner has combed the record below for snippets of testimony (U.S. Br. 37-40), much of it wholly unrelated to the VWIL program, in an attempt to bolster its claim that VWIL's design reflects stereotyped views. But that attempt to impugn as archaic stereotypes the scholarly conclusions cited above is directly contradicted by the findings below and ignores the fact that even petitioner's witnesses provided support for these conclusions. For example, a study conducted by one of *petitioner's* experts found that "the declines in psychological well-being (feeling depressed, feeling overwhelmed, low self-rating on emotional health) are all stronger among women than among men during the undergraduate years." II DX 104 at 404-05 (II JA 278; L. 346). Another of petitioner's experts conceded that "[t]he psychological and sociological differences between men and women are real differences, not stereotypes." Pet. App. 225a.

A third expert for petitioner admitted that "there clearly

are differences between men and women, and not only obvious physiological ones, but ones having to do in part with how they interact, how they learn and so on." I Tr. 377 (I JA 625); II Tr. 1083 (II JA 913). This expert further testified that he was not aware of any stereotyped views being expressed by the members of the MBC Task Force. II Tr. 1089-90 (II JA 918-19).

Although petitioner complains that VWIL is not identical to VMI, it is most telling that none of petitioner's experts was willing to recommend VMI's adversative method as an appropriate educational methodology for developing women leaders. Indeed, petitioner's experts testified that they were unaware of *any* educational authorities who advocated the VMI approach for educating women (II Tr. 956, 1105, 1301 (II JA 889, 923, 992)), and some stated that they would not recommend the adversative method for either men or women. II Tr. 902, 1300-01 (II JA 861, 991-92). Nor did petitioner's experts assert that the VWIL program would be inappropriate or ineffective for women. Pet. App. 68a, 76a. In fact, petitioner's expert on curricular and co-curricular offerings admitted that neither VMI's program nor VWIL's program was "better than the other." *Id.* at 69a n.5, 96a.

Petitioner's claim of impermissible stereotyping also ignores the fact that the demand among women college students for an adversative program like that offered at VMI is too small to make such a program workable. As detailed elsewhere (*see* Va. Br. 43-45), the evidence at trial showed that "there would be little demand for a female VMI" and that the VMI model "is deficient from the standpoint of attracting a sufficient clientele" from among women college students. Pet. App. 27a, 73a, 75a & n.12; II DX 11J at 5 (II JA 148; L. 300). Wholly aside from the pedagogical reasons for preferring the VWIL model, therefore, the differences between VWIL and VMI are justified by the need

to attract sufficient numbers of women students to make the program workable.[24]

At bottom, petitioner's challenge to the VWIL program rests upon a fundamental misconception about the nature of the stereotypes condemned by this Court's precedents. Petitioner assumes that a gender-based classification is invalid unless it relates to characteristics that hold true in every individual instance. But this Court's cases do not support such a categorical approach. In *Schlesinger v. Ballard*, 419 U.S. 498 (1975), for example, the Court upheld a statute granting female Navy officers longer tenure before mandatory discharge than their male counterparts. The Court specifically rejected the contention that the gender-based classification was based on impermissible "archaic and overbroad generalizations," explaining that female officers "will not *generally* have compiled records of seagoing service comparable to those of male[s]." *Id.* at 508 (emphasis added). The Court did not purport to require that this generalization be true in every instance; rather, the Court found it permissible because it reflected current reality rather than the types of outmoded stereotypes condemned in past cases. *See id.* at 507.[25]

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[24]That fact alone serves to distinguish this case from *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), and other cases in which a woman's ability to receive a government benefit did not depend upon locating a substantial number of other qualified women willing and able to join her.

[25]As this Court noted in *Rostker v. Goldberg*, 453 U.S. 57, 71 (1981), "*Schlesinger* v. *Ballard* did not purport to apply a different equal protection test because of the military context." The *Ballard* Court did "stress the deference due congressional choices among alternatives" in the military context (*id.*), but deference is also due to the decisions of state and local governments regarding the best means of educating their citizens. *See, e.g., Wood v. Strickland*, 420 U.S. 308, 326

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Similarly, *Califano v. Webster*, 430 U.S. 313, 318 (1977), upheld a statute giving women higher social security benefits than men because "women . . . have been unfairly hindered from earning as much as men." Although this rationale was plainly not applicable to every affected individual, the Court expressly rejected the suggestion that it reflected "'archaic and overbroad generalizations' about women" or "'the role-typing society has long imposed' upon women, such as casual assumptions that women are 'the weaker sex' or are more likely to be child-rearers or dependents." 430 U.S. at 317 (citations omitted).[26]

The lesson to be drawn from this Court's gender discrimination cases, therefore, is that government is not precluded from relying on all demonstrable norms in adopting gender classifications. The stereotypes condemned by this Court's cases involved "archaic" assumptions and "outdated misconceptions" about men and women (*Craig v. Boren*, 429 U.S. 190, 198-99 (1976)) that were characteristic of the "role-typing society has long imposed" (*Stanton v. Stanton*, 421 U.S. 7, 15 (1975)), such as the stereotypes that "female spouses . . . would normally be dependent upon their husbands," *Weinberger v. Weisenfeld*, 420 U.S. 636, 643 (1975), that only "male workers' earnings are vital to the support of their families," *id.*, or that "the female [is]

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(1975); *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 234-35 (1972).

[26]Although these two cases involve classifications benefiting women, the standard for judging the constitutionality of gender classifications does not vary with the sex of the class benefited or the nature of the proffered justification. *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 723, 724 n.9, 728.

destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Stanton v. Stanton*, 421 U.S. at 14-15.

Thus, in reviewing the constitutionality of a gender classification, the role of the courts "is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 725-26. Where the decision to utilize the challenged classification was not made "'unthinkingly' or 'reflexively'" as "the '"accidental by-product of a traditional way of thinking about females,"'" *Rostker v. Goldberg*, 453 U.S. 57, 72, 74 (1981), but instead "realistically reflects the fact that the sexes are not similarly situated in certain circumstances," *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981) (plurality opinion), the classification will be upheld, even if its rationale cannot be said to apply with precision to every individual subject to it. *Id.*; *Rostker v. Goldberg*, 453 U.S. at 78; *Parham v. Hughes*, 441 U.S. 347, 354 (1979) (plurality opinion); *Schlesinger v. Ballard*, 419 U.S. at 508.

The VWIL program and its methodology are constitutional under these principles. Unlike the archaic and harmful stereotypes condemned in this Court's cases, VWIL is not based upon any outdated notions about the proper role of women in society. Quite the contrary, VWIL is founded on the principle that women's place in "the marketplace and the world of ideas" -- and in the military -- is the *same* as that of men, but that student demand and developmental norms make VWIL's methodology a more effective and practicable means of maximizing opportunities for the development of confident and successful women leaders. These conclusions reflect the thinking and experience of principled and committed educators, individuals who have

dedicated their lives to the education of women.

Plainly, therefore, VWIL is not founded on impermissible stereotypes that "deprive[] persons of their individual dignity and den[y] society the benefits of wide participation in political, economic, and cultural life." *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984). In fact, VWIL's fundamental premise is the very antithesis of the stereotypes rejected by the Court in the past. VWIL rightly assumes that women can and will achieve success and leadership in business, politics, and the military to the same extent as men, and it is thoughtfully designed with the aid of modern scholarship and experienced educators to ensure that its graduates succeed in attaining those goals.

The foregoing discussion demonstrates the complete inaccuracy of petitioner's contention (U.S. Br. 40) that VMI and VWIL perpetuate the stereotype that "men, and not women, are fit to be strong leaders in the military and other fields." Petitioner attempts to analogize this case to *Mississippi University for Women v. Hogan*, but comparing VWIL to the school of nursing at issue in *Hogan* is nothing short of preposterous. That school fostered the outdated stereotype that nursing is a "women's" profession; VWIL, by contrast, cannot plausibly be said to foster the stereotype that women are not fit for leadership. Every woman who enrolls in VWIL is *required* to participate in ROTC so as to be prepared to assume a military leadership position, and everything about the VWIL program, including its mission, its curriculum, its co-curricular activities, its rigorous physical and mental regimen, and even its name, emphasizes the program's overarching goal of creating bold, effective women leaders.

It is equally false to suggest (U.S. Br. 24-25) that VMI sends the message that women are unfit for a rigorous military or similar career. VWIL's rigorous program for developing tough and independent leaders unequivocally

demonstrates Virginia's belief that women can and will attain leadership positions both in the military and elsewhere. Indeed, VMI, VWIL, and Virginia's public coeducational ROTC programs, including the coeducational Corps of Cadets at VPI, all provide precisely the same opportunity for students to pursue a military career. The district court specifically found that "nothing about the ROTC programs at VMI is unique to VMI other than the absence of women," and non-VMI students perform marginally *better* than VMI students in their ROTC programs. Pet. App. 116a-117a, 119a.[27] In short, there is no basis for petitioner's suggestion that women at VWIL will have less of an opportunity for a military career than men at VMI.

Petitioner also appears to contend (U.S. Br. 41-42) that the States are precluded from taking into account demonstrated differences among students in their respective educational needs when such differences "may themselves result from historical sex-based bias," because the law must not "'reinforce patterns of historical discrimination.'" Even if some of these demonstrable differences were shown to be the product of past discrimination -- a showing that petitioner has not made in this case -- it would hardly follow that educators must ignore these real differences in formulating programs of public education. Instead, the approach most in keeping with the Constitution's mandate of equal opportunity would be precisely that followed by the MBC Task Force here, namely, to develop programs that are designed to *overcome* and *eliminate* any lingering effects of societal stereotyping by developing self-confident graduates

[27]The military's ROTC programs do not utilize adversative training methods, and it is not necessary for students to be exposed to those methods or to the other aspects of the VMI program in order to succeed in ROTC and the military. Pet. App. 67a, 118a.

of both sexes who are equally well-equipped to seek and obtain leadership positions in all facets of American society, regardless of discredited notions about which gender is better suited to a particular job.

Indeed, petitioner's contrary argument is directly at odds with this Court's recognition that overcoming past discrimination against women is a legitimate and important state objective.[28] If, as petitioner contends, government is precluded from recognizing the lingering effects of discrimination and taking steps to counteract those effects based on the expert advice of experienced professionals, *no* gender classification aimed at compensating for past discrimination could survive constitutional attack. Petitioner states (U.S. Br. 45 n.32) that single-sex education may be justified by a "compensatory purpose," but that statement is impossible to reconcile with petitioner's strident rejection of the proposition that Virginia may take action in response to demonstrable differences in psychological and behavioral norms that may be attributable to societal influences.

The findings and expert evidence in the record demonstrate that single-sex education tends to *reduce* the effects of societal stereotyping on both men and women by making students "more likely to take the risk of choosing a career normally associated with the other sex," Pet. App. 226a, and that VWIL will be *more* effective than an adversative-type program at preparing most women students to assume leadership roles in modern society. *Id.* at 27a, 63a-64a, 73a-74a. If anything, therefore, it is *petitioner*, not respondents, who would "restrict men and women to socially assigned roles" by depriving women of the leadership development opportunities made possible through the VWIL

[28]*E.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 728; *Califano v. Webster*, 430 U.S. at 317.

program. Petitioner's dismissive attitude toward the rigor and effectiveness of the VWIL program is not only contrary to the record and findings below; it is insulting to the dedicated experts in women's education who created the program and the more than 40 young women who have already acted upon their desire to benefit from VWIL and its unique and challenging educational experience.

C. The Equal Protection Clause Does Not Require That Single-Sex Educational Programs Be Identical In All Respects

Petitioner contends (U.S. Br. 42-44) that VWIL is an inadequate remedy because it denies opportunity to any individual woman who might be qualified for and might prefer VMI's methodology. In effect, petitioner's argument is that a State cannot offer the admitted benefits of single-sex education to students of both genders if there is even one student who would prefer the program available to the other gender. That argument is without merit.

In the first place, as a factual matter it is simply not true that women are denied the educational benefits afforded to men at VMI. All of the academic offerings at VMI are available to women at other public institutions in Virginia, and VWIL is designed to provide the same educational benefits and produce the same educational outcomes as VMI. The courts below found that it will achieve that goal. Moreover, those women who might prefer VMI's adversative method could not obtain it in any event, because there is insufficient demand to permit implementation of that methodology in a separate program for women and because, as the courts below found, VMI (or any other school) would be compelled to eliminate or modify drastically that methodology in a coeducational setting. *See infra* pp. 43-47; Va. Br. 33-36, 43-45.

Second, petitioner's argument would, as a practical matter, entirely preclude state and local governments from funding single-sex educational programs of any kind for students of either gender, no matter how beneficial and important those programs may be to some students.[29] There will inevitably be some differences between parallel educational programs, whether in location, faculty, alumni, physical facilities, reputation, history, traditions, curriculum, size, methodology, or quality of student body. Recognizing this reality, the court of appeals held that the Constitution is satisfied as long as the educational benefits and outcomes provided by the parallel programs are substantively comparable, and found that VMI and VWIL satisfy that high standard. If, however, as petitioner contends, the existence of *any* difference deemed material by *any* student is sufficient to require invalidation of a single-sex admissions policy, public single-sex education becomes impossible.[30]

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[29]Petitioner reluctantly suggests (U.S. Br. 45 n.32) that single-sex education "may" be constitutional in furtherance of a "'compensatory purpose.'" In *Hogan*, however, this Court rejected that justification absent a "showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field." 458 U.S. at 729. Women now participate fully and successfully at all levels of the educational system. Indeed, more women than men attend and graduate from college, and the percentage of high school graduates going on to college is higher for women than for men. U.S. Dep't of Education, National Center for Education Statistics, Digest of Education Statistics 176, 185, 188, 250 (1995). Petitioner's reluctance to endorse the "compensatory" rationale for single-sex education is thus amply justified.

[30]Moreover, direct and indirect public financial assistance (including tax exemptions) for private single-sex schools or for students attending those schools would likely be unavailable as well. This Court made clear in *Norwood v. Harrison*, 413 U.S. 455, 465 (1973), that "'a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'" Thus, government

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Petitioner's insistence on an absolutely precise means-end fit is particularly inappropriate in the context of education. Educational programs must of necessity be designed to accommodate group needs and preferences rather than the desires of individual students. *See* Pet. App. 172a; I Tr. 702 (I JA 949); II Tr. 697. Petitioner's approach would preclude innovative attempts by public schools to respond to demonstrable needs in a wide variety of circumstances, including all-girls' math and science classes, special single-sex programs for inner-city youths, and the like (*see* Va. Br. 39-41; Br. *Amicus Curiae* of Women's Schools Together, Inc., *et al.*), merely because the behavioral or psychological norms justifying the need for such programs are not applicable in *every* individual instance. Acceptance of petitioner's claim that the Constitution precludes reliance on any characteristics not uniformly applicable on gender lines would thus serve only to deny valuable opportunity to numerous students without providing concrete benefits to anyone. The impact of this rigid doctrine would, moreover, be felt most severely by students from economically and socially disadvantaged backgrounds, because it is precisely

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could be barred from providing financial aid to students attending private single-sex schools if it could not maintain those schools itself. *See* Br. *Amicus Curiae* of Mary Baldwin College at 22-25. Petitioner cites *Blum v. Yaretsky*, 457 U.S. 991 (1982), and *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), for the contrary proposition (*see* U.S. Br. 45 n.31), but those cases hold only that public aid does not turn private entities into state actors or render the government liable for the actions of private parties. They do not contradict *Norwood*'s ban on public financial assistance to private organizations whose discriminatory admissions policies would violate the Constitution if practiced by the government.

those students who can often benefit most from a single-sex education and yet are least likely to be able to afford a private single-sex college. *Id.*; Pet. App. 71a, 74a.

In any event, petitioner is simply wrong as a matter of law in suggesting that a classification is invalid if there are any members of one gender as to whom the classification is not accurate. This Court has never held that there must be an absolutely precise fit between a gender-based classification and the interests served by it. In *Schlesinger v. Ballard*, for example, as noted above, the Court upheld a gender classification even though the Government had made no showing that the generalization supporting it was true in every instance. *See* 419 U.S. at 508-10 & n.13.[31]

Petitioner identifies no authority to the contrary. Instead, it cites cases invalidating gender classifications based on "'archaic'" and "'outdated'" assumptions or "'stereotypical

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[31]Other cases are to the same effect. *E.g.*, *Heckler v. Mathews*, 465 U.S. 728, 749 & n.15 (1984) (approving gender classification justified by need to protect individuals who "may reasonably be assumed" to have relied on prior law, without requiring proof that all of the individuals so benefited had relied or that all of the excluded individuals had not); *Rostker v. Goldberg*, 453 U.S. 57, 81 (1981) (rejecting challenge to exclusion of women from the draft even though "in the event of a draft of 650,000 the military could absorb some 80,000 female inductees"); *Califano v. Webster*, 430 U.S. at 318 (upholding higher social security benefits for women because "women . . . have been unfairly hindered from earning as much as men," without requiring proof that each woman so benefited had suffered discrimination or that each excluded man had not); *see also Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 579, 582-83 (1990) (classification need not be accurate "in every case" to survive intermediate scrutiny as long as it will, "in the aggregate," advance the underlying objective), *overruled in other part on other grounds*, *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

notions'" containing at most a "'shred of truth.'" U.S. Br. 43 n.29; *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1427 n.11 (1994). As explained above, the differences between VMI and VWIL are not based on such impermissible stereotypes, but are instead predicated on the expert knowledge, advice, and research of highly regarded professional educators and social scientists. The cases cited by petitioner are therefore inapposite.

Moreover, none of the cases cited by petitioner purports to require the degree of tailoring that petitioner seeks. The classification invalidated in *Craig v. Boren*, 429 U.S. 190 (1976), for example, was highly imprecise. *Id.* at 201-03 & n.16. Likewise, most of the empirical evidence in *J.E.B.* refuted the existence of *any* correlation between gender and juror attitudes. 114 S. Ct. at 1426-27 & n.9. *See also Hogan*, 458 U.S. at 731 (record was "flatly inconsistent" with proffered justification); *Frontiero v. Richardson*, 411 U.S. 677, 689 (1973) (plurality opinion) ("no concrete evidence" supporting proffered justification).

Petitioner's argument that the justifications for gender classifications must be applicable in every individual instance is, in effect, an attempt to incorporate the narrow-tailoring requirement of strict scrutiny into the intermediate scrutiny context. This Court's precedents do not permit that approach, however, and its adoption would effectively overrule numerous decisions of this Court and invalidate scores of federal and state laws and programs.

III. THE EQUAL PROTECTION CLAUSE DOES NOT MANDATE COEDUCATION AS THE ONLY PERMISSIBLE REMEDY IN THIS CASE

Petitioner contends that VMI must become coeducational

in order to provide a "complete remedy." U.S. Br. 21.[32] The record and findings below conclusively demonstrate, however, that VWIL in fact provides a far more effective and complete remedy than a coeducational VMI would offer. Most importantly, VWIL extends the proven and substantial benefits of a single-sex college education to women. Petitioner's preferred remedy, by contrast, would deny those benefits to both women and men.

In addition, as both courts below found, neither women nor men would receive the benefits of VMI's adversative method if VMI were to become coeducational, because the need to attract and accommodate a different student population would necessarily lead to fundamental changes in that method. *See* Va. Br. 16-19, 34-36. Petitioner disagrees with that factual finding, but its attempt to reargue the facts in this Court, armed only with its own opinions, is both improper and unavailing.

For example, petitioner ignores the record in asserting (U.S. Br. 27-28) that the creation of privacy rights on gender grounds would not affect VMI's methodology. The VMI method operates by breaking down and eliminating distinctions between students and building group identity within the entire class by subjecting everyone to exactly the

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[32]Petitioner also claims (U.S. Br. 21, 26) that the "presumptive remedy" for an invalid exclusion is elimination of the benefits being afforded to the unconstitutionally favored class. The Court's equal protection cases are to the contrary. *See, e.g., Heckler v. Mathews*, 465 U.S. at 738-39 & n.5. Petitioner relies on *Orr v. Orr*, 440 U.S. 268, 283 (1979) (*see* U.S. Br. 21), but that case merely holds that a State cannot maintain a gender-based classification where its purposes are "as well served by a gender-neutral classification." Because Virginia's objective of providing the option and benefits of a public single-sex college education is not served at *all* by a gender-neutral classification, *Orr* is inapposite.

same standards and to the constant scrutiny of all other students. Pet. App. 6a, 23a, 191a-92a, 194a, 197a, 233a, 237a. A system of separate privacy rights within each class for groups of students defined by their gender would thus be directly contrary to central attributes of the VMI method. The courts below found that the absence of privacy is "essential to the leveling process," *id.* at 6a, but coeducation would frustrate that process by separating VMI's student body into two distinct gender groups, each continually asserting privacy rights as against the other.

For the same reasons, petitioner's claim (U.S. Br. 28-29) that VMI's method would not be affected by the adoption of "ability groupings" or other "accommodations" for the physical differences between men and women is simply false. The courts below found that VMI's egalitarianism, including its imposition of identical physical standards on all students, was an essential element of its program. Pet. App. 146a-47a, 237a-38a.[33] That egalitarian ethic would be severely undermined by abandonment of uniform physical standards, causing male and female students to "perceive the treatment of them as unequal." Pet. App. 147a.

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[33]Petitioner suggests (U.S. Br. 29) that VMI already accommodates physical differences, because many students fail the physical fitness test at least once. But VMI does not purport to eliminate physical differences among students. Instead, the crucial attribute of VMI's methodology is its insistence on imposing the same standards, including the same physical fitness test, on all students. All students are subject to the same fitness test and suffer the same consequence for failure to pass it (namely, a failing grade on that portion of the semester's physical fitness course). I Tr. 316-17 (I JA 564-65). The fact that participants in varsity sports miss a fraction of the physical training program while at practice is beside the point, because they are still subject to the same fitness standards and they participate in precisely the same activities at all other times. I Tr. 111-12 (I JA 359-60); Pet. App. 195a.

Petitioner makes no effort to refute the factual findings below that VMI's adversative method could not accommodate the effects of the cross-gender harassment that would result from an attempt to employ that method in a coeducational setting. Instead, petitioner erroneously contends that the court of appeals' reliance on this fact is "impermissible" because it reflects "'romantic paternalism'" about what behavior is "unseemly." U.S. Br. 30.

The district court found, and the court of appeals agreed, that the adversative system would necessarily undergo fundamental changes if VMI were to become coeducational. Pet. App. 6a, 147a, 227a, 238a-39a. That finding was not based on an assumption that cross-gender confrontation is "unseemly" but on expert testimony and the experience of the U.S. military academies, which demonstrated that the reality of cross-gender interactions and relationships between college students would inevitably lead to substantial changes in the ethic of absolute egalitarianism and the intentional harassment and intimidation that characterize the adversative method. *Id.*; *see* Va. Br. 34-36. No matter how much petitioner would like to pretend that college students always interact with members of the opposite sex in precisely the same way that they interact with members of the same sex, the record and findings below (as well as common sense) are to the contrary.[34] Moreover, petitioner's attempt to dismiss the seriousness of these concerns

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[34]Even petitioner's education expert conceded that aspects of the VMI experience would be "deeply affected" by coeducation and that the admission of women would be "a pretty dramatic clientele change" that would necessarily produce "major . . . consequences, for the academic system, for the athletic system and for the lifestyle system." I Tr. 365, 368, 399 (I JA 613, 616, 647). He also stated that "[t]hese [changes] are not insignificant and in no way would I diminish their importance." I Tr. 365 (I JA 613).

is, at best, disingenuous, because petitioner affirmatively argued below that the adversative method would have to be altered so as to avoid "harassment" deemed inappropriate for women. II JA 101.[35]

Petitioner also contends (U.S. Br. 27, 31-32) that VMI would not be "destroy[ed]" by coeducation, and points to the transformation of the service academies from single-sex to coeducational institutions. It is no doubt true that VMI could survive as a college if it were to admit women. The central point, however, is that it would no longer offer the benefits of single-sex education, nor would it be able to retain the adversative system. VMI would instead become nothing more than a pale shadow of the service academies, far less attractive to students because unable to guarantee free tuition, student pay, or an active-duty military commission, and indistinguishable in its methodology from the coeducational Corps of Cadets and ROTC program already available at VPI. Pet. App. 173a; I DX 58 at 25 (I JA 1757; L. 225).

Indeed, far from supporting petitioner's contentions, the experience of the service academies further bolsters the conclusion that VMI's adversative methodology would not

[35]Petitioner also insisted that VMI would have to enforce "a zero tolerance policy in regard to acts of gender discrimination and harassment committed by cadets," that VMI would be required to "make available to all cadets counseling services relating to problems of discrimination or harassment on the basis of gender," and that "[l]ying about any violations of regulations governing gender discrimination or harassment shall be treated as an Honor Code violation." II JA 101, 103-04. Petitioner has yet to explain how the extreme harassment and intimidation inherent in the adversative method could be implemented in a coeducational setting without creating a "hostile environment" constituting impermissible sexual harassment.

survive coeducation. *See* Va. Br. 34-35; Pet. App. 172a n.8, 235a-41a. Approval of petitioner's arguments would thus deprive both women and men of an educational option they now have -- namely, a single-sex college education focused on leadership, character development, and military training -- without extending to them any educational opportunity that is not already available elsewhere. Petitioner's insistence that VMI must admit women (and, implicitly, that VWIL must admit men) is thus an attempt to lessen diversity in public higher education by mandating conformity and coeducation. The Constitution should not be construed to incorporate petitioner's view that coeducation is the only acceptable method for educating college students in public institutions.

IV. STRICT SCRUTINY IS NOT APPLICABLE IN THIS CASE

For the first time in this case, petitioner asserts (U.S. Br. 17-18, 33-36) that gender-based classifications should be subjected to strict judicial scrutiny. This Court should decline petitioner's untimely invitation to address that issue, which was neither pressed nor passed upon below.

A. The Issue Of Strict Scrutiny Issue Is Not Properly Presented

Petitioner has waived the issue of strict scrutiny by failing to raise that issue at any stage of this case prior to the filing of its opening brief on the merits in this Court. Indeed, in the district court, petitioner affirmatively scorned the very position it now advances, asserting that "the United States has never argued that this Court should abandon the Supreme Court's well-settled adherence to the intermediate standard of review in gender classification cases." R. 88, at 3. Petitioner announced that the Government's position was "*unequivocally* that the appropriate standard in this case is 'intermediate scrutiny,' and that a classification

based on gender must be 'substantially related to the achievement of a sufficiently important governmental objective.'" *Id.* (emphasis added).

Petitioner consistently adhered to that position in the court of appeals.[36] And in reliance on petitioner's concessions, the courts below did not address the question of strict scrutiny at all. That question is, therefore, not properly before the Court. *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466 (1993); *Yee v. City of Escondido*, 503 U.S. 519, 532-33 (1992); *Demarest v. Manspeaker*, 498 U.S. 184, 188-189 (1991).

Petitioner's attempt to inject the issue of strict scrutiny at this stage of the proceedings is particularly inappropriate given the contrary position advanced by petitioner the last time the case reached this Court. In opposing certiorari at the liability stage, petitioner affirmatively represented to this Court that "*Hogan* supplies the test for determining whether VMI's male-only admissions policy violates the Equal Protection Clause of the Fourteenth Amendment." 92-1213 Br. in Opp. 9.[37] Petitioner should not be permitted an eleventh-hour change in its legal posture after insisting on a contrary position for more than five years of litigation at all levels of the federal judiciary.

B. Strict Scrutiny Should Not Apply To Gender Classifications

As petitioner has observed, intermediate scrutiny is one of this Court's "'firmly established principles' for evaluat-

[36] *See* 91-1690 Gov't C.A. Reply Br. 4; *see also* 94-1667 Gov't C.A. Br. 8; 91-1690 Gov't C.A. Br. 21, 23-29.

[37] Petitioner reaffirmed that position at the certiorari stage after the remedial decision below. *See* 94-1941 Pet. 19; 94-1941 Pet. Reply Br. 5-10; 94-2107 Cross-Pet. Br. in Opp. 5 & n.2.

ing claims of gender discrimination." R. 88 at 3. Indeed, this Court has applied that standard in every gender-based equal protection case since at least *Craig v. Boren*, 429 U.S. 190 (1976). Adoption of strict scrutiny for gender classifications would require the Court to overrule numerous prior decisions applying intermediate scrutiny to uphold gender-based classifications.[38]

"[A]ny departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Petitioner does not even attempt to offer any "special justification" for its last-minute request that the Court reject two decades of constitutional jurisprudence.

Instead, petitioner merely confirms the inappropriateness of strict scrutiny for gender classifications by seeking to exempt the military from the impact of that standard. U.S. Br. 34 n.23. Petitioner's advocacy of a form of qualified or selective strict scrutiny is wholly incompatible with this Court's equal protection jurisprudence, which demonstrates that "inherently suspect" classifications may not be treated as suspect only some of the time. *See Adarand Constructors, Inc. v. Pena*, 115 S. Ct. at 2113; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989). Deference to military affairs would not insulate the military's widespread disparate treatment of men and women from strict scrutiny any more than it would permit the military to reinstitute racially segregated units. *See Rostker v. Goldberg*, 453 U.S. at 69-71 (the military is subject to the same standard applied to other gender classifications, and "deference [to military decisionmaking] does not mean abdication").

[38] *E.g.*, *Heckler v. Mathews*, 465 U.S. 728 (1984); *Michael M. v. Superior Ct. of Sonoma Cty.*, 450 U.S. 464 (1981); *Parham v. Hughes*, 441 U.S. 347 (1979); *Califano v. Webster*, 430 U.S. 313 (1977); *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

In truth, intermediate scrutiny has achieved the worthy and balanced goal of invalidating most governmental line-drawing based on gender while preserving those relatively few gender distinctions that are supported by legitimate and important reasons. Adoption of strict scrutiny would serve only to bring into question the constitutionality of those remaining gender classifications that do serve important and valid governmental objectives, particularly in the military, prisons, and education. Petitioner fails to identify any need for achieving that result. Indeed, petitioner's change of heart regarding the standard for judging gender classifications appears to reflect nothing more than petitioner's implicit recognition that public single-sex education like that at VMI and VWIL can and should survive intermediate scrutiny.[39]

CONCLUSION

Virginia has developed a higher education program that includes recognition of the fact, endorsed widely by experts in education, that some students benefit greatly from single-sex colleges and develop into successful, confident adults more readily in such an environment. The Equal Protection Clause does not prohibit States from offering that opportunity to its young women and men in parallel programs developed by experts to meet the needs of young people. The judgment of the court of appeals should be affirmed.

December 15, 1995 Respectfully submitted.

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[39]In addition to the reasons set forth above, strict scrutiny is also inappropriate in the gender context for the reasons set forth in the briefs *amicus curiae* of the State of Wyoming, *et al.*, and the Independent Women's Forum, *et al.*

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COMMONWEALTH OF VIRGINIA, *et al.*,
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v.

UNITED STATES OF AMERICA
Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY BRIEF FOR THE CROSS-PETITIONERS

In its brief as cross-respondent in No. 94-2107 ("Br."), the Government makes clear that it seeks the elimination of essentially all public single-sex education in the United States. Under the Government's view of the law, neither the proven and essentially unquestioned pedagogical advantages of single-sex education for some students, nor the informed judgments of educators about how best to use scarce educational resources to meet the needs and interests of students of both sexes, can permit any deviation from a single-minded insistence on coeducation. But the Equal Protection Clause cannot and should not be construed to constitutionalize the Government's misguided conception of equality at the expense of the proven educational interests

and needs of the Nation's young men and women.

In its quest to impose coeducation as the only permissible pedagogical option, the Government disregards the informed opinions of expert educators and the careful fact-finding of the courts below. The intermediate scrutiny test calls for detailed factual analysis of all relevant circumstances relating to a challenged classification. Nevertheless, the Government repeatedly ignores or dismisses as "stereotypes" the reasoned findings of both courts below, even though those findings are based on overwhelming expert evidence that demonstrates the positive educational benefits of single-sex education and the impossibility of duplicating the distinctive qualities of VMI's method in a coeducational setting. In effect, the Government argues that lawyers, not experienced educators applying the conclusions of contemporary research, should determine "what is 'current' and what is 'outmoded' in the perception of" male and female college students. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 471 n.6 (1981) (plurality opinion). That approach must be rejected.

I. VMI'S ADMISSIONS POLICY SERVES IMPORTANT GOVERNMENTAL OBJECTIVES

A. Providing The Proven Benefits Of Single-Sex Education And The VMI Method Are Important Governmental Objectives

The Government makes no effort to, and could not in any event, refute the established fact that single-sex education provides substantial pedagogical benefits to some college students that cannot be supplied by a coeducational program. *See* Va. Br. 24-28; Va. Resp. Br. 19-21. The Government instead contends that the Equal Protection Clause prohibits Virginia and VMI from offering those benefits because, in its view, VMI's single-sex admissions policy "reinforce[s] restrictive roles for men and women" and is based on the stereotype that "rigorous, military-style training is not appropriate for women." Br. 14, 35. There is no merit in those contentions.

VMI's single-sex admissions policy is not founded on impermissible stereotypes about the "proper" roles of men and women. To the contrary, Virginia has acted pursuant to its conviction that women students are well suited for all courses of study and roles in life. The vast majority of Virginia's institutions of higher education, including the "rigorous, military-style training" program at Virginia Polytechnic Institute and State University (VPI), are open to women, and there is no subject or course of study offered at VMI that is not available to women at other prestigious public institutions in Virginia.

Rather than embodying stereotypes about gender roles, VMI's single-sex admissions policy instead reflects the obvious truth that the benefits of single-sex education can only be offered by an institution that limits admission to one sex, and the additional fact (found by both courts below) that VMI's educational methodology is not practicable in a coeducational setting. *See* Va. Br. 33-36; Va. Resp. Br. 43-47. As both courts below found, moreover, single-sex education in fact helps to combat gender stereotypes by encouraging students to pursue careers once associated primarily with the opposite sex. Pet. App. 149a-50a, 226a-27a.[1]

The Government also argues (Br. 15-16, 23-26) that there

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[1]The Government inaccurately characterizes this factual *finding* as "cross-petitioners' *suggestion*," and purports to find it "bewildering." Br. 14-15 (emphasis added). The Government's bewilderment cannot change the reality that this unambiguous factual finding was affirmed on appeal and is supported by overwhelming expert evidence. *See* I DX 73J (II DX 216J); Riesman Dep. (I DX 60) at 58, 106-07 (I JA 194, 242-43); *see also* Br. *Amicus Curiae* of Mary Baldwin College at 17-20.

can be no valid governmental interest in providing the benefits of single-sex education absent identical programs for both genders.[2] That argument rests on a misreading of this Court's decision in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). The women-only admissions policy at issue in *Hogan* was not and could not be defended on the ground that single-sex education provides unique benefits that are lost in a coeducational environment; the "uncontroverted record" in that case was "flatly inconsistent with the claim that excluding men . . . [wa]s necessary to reach any of [the nursing school's] educational goals." *Id.* at 730-31.

It is an established fact in this case, by contrast, that VMI's single-sex admissions policy *is* necessary to achieve the goals of offering students the proven benefits of single-sex education and the VMI method. *Hogan* simply cannot be read to reject the constitutional validity of single-sex education under these circumstances.[3] Indeed, as the Government concedes (Br. 26), *Hogan* suggests that single-sex education *is* permissible "where its benefits for particular populations serve legitimate, important governmental objectives that cannot be served by sex-neutral alternatives."

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[2]Of course, Virginia does provide the benefits of single-sex education to both women and men through the parallel and comparable VWIL and VMI programs, as the courts below found.

[3]Thus, the Government's reliance on footnote 17 in *Hogan* is misplaced. That footnote reflects only the commonsense notion that a single-sex program cannot automatically be justified merely by a showing that it provides generic benefits -- unrelated to its single-sex status -- for anyone who participates in it. The proponents of such a program must show instead that there is a substantial relationship between the program's exclusion of one gender and its ability to provide the particular educational benefits it offers. That showing was not attempted in *Hogan*, but it has been made here.

VMI's single-sex admissions policy has been found to provide benefits for its students that cannot be replicated in a coeducational environment, and that finding demonstrates its constitutional validity.[4]

Contrary to the Government's suggestions (Br. 24, 26), the validity of VMI's single-sex admissions policy does not mean that all single-sex programs are "constitutional *per se*" or that a State could "designate its only engineering or medical school for men" or limit most of its educational offerings to students of one sex. Each public single-sex program must be examined against the backdrop of the State's overall educational offerings to determine whether the exclusion of the opposite sex actually increases educational diversity and enhances educational benefits without unduly restricting opportunity. The extreme hypotheticals offered by the Government would be impossible to justify under that standard. The facts of this case demonstrate, by contrast, that VMI's single-sex policy provides substantial pedagogical benefits and enhances educational diversity without depriving women of any educational opportunity they could obtain if VMI were coeducational.

B. Achieving The Benefits Of Single-Sex Education And The VMI Method Are The Actual Reasons For VMI's Admissions Policy

The Government contends (Br. 18-23) that the justifications advanced for VMI's admissions policy are not the

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[4]The Government confuses the means with the end in arguing (Br. 26) that the exclusion of one gender from a particular institution "is clearly not a valid end in itself." VMI's single-sex admissions policy is not an "end in itself" but a *sine qua non* for the proven pedagogical advantages for some students that flow from a single-sex environment and the VMI method. It is those proven advantages, not the exclusion of one sex, that cross-petitioners seek.

actual reasons for that policy. First, the Government asserts (*id.* at 19) that VMI's policy was originally founded upon invalid "assumptions about men's and women's proper roles." That bald assertion is unsupported by any citation to the record, nor could it be. And more to the point, VMI reexamined its admissions policy years before this litigation commenced and decided after careful analysis to maintain that policy in order to continue providing the benefits of single-sex education and the VMI method. *See* Va. Br. 13-14, 30-31; *see also Rostker v. Goldberg*, 453 U.S. 57, 74-75 (1981) (rejecting contention that gender-based classifications must be judged by reference to the original reasons for their adoption); *Michael M.*, 450 U.S. at 470-72 & nn.6-7 (same).

The Government thus errs in asserting (Br. 19) that Virginia did not identify any legitimate basis for maintaining VMI's single-sex admissions policy before this suit was instituted. In recommending continuation of VMI's admissions policy in 1986, the Mission Study Committee specifically relied on its concern that VMI's system would not achieve the same results in a coeducational environment. I DX 40 at 2-3 (I JA 1721-22; L. 196-97). The VMI Board of Visitors, which is "convinced of the value of single sex education," looked to its own expertise and experience as well as the Mission Committee's report and concluded that VMI's single-sex status was "absolutely essential" to the successful implementation of its educational methodology. I Tr. 947-48, 951-52, 971 (I JA 1193-94, 1197-98, 1217).

Thus, the district court was amply justified in finding that VMI's admissions policy "has been continued only after reasoned and careful analysis by the Board of Visitors" and is based on the Board's conclusion "that providing a distinctive, single-sex educational opportunity" is an "important" goal. Pet. App. 170a, 214a; *see id.* at 173a. In short, VMI's admissions policy has been retained only after careful consideration of the coeducational alternative. That

reasoned and legitimate policy choice cannot be dismissed as an unthinking stereotype. *See Rostker v. Goldberg*, 453 U.S. at 74; *Michael M.*, 450 U.S. at 471 n.6 (plurality opinion).[5]

The Government is also wrong in characterizing as "post hoc" Virginia's interest in providing diverse educational offerings including single-sex education. Br. 20. There is no dispute that Virginia has long had an official policy of emphasizing diversity of educational offerings through delegation of substantial decisionmaking authority to each individual public institution of higher education. Pet. App. 81a, 152a, 187a-88a; Va. Br. 28-30. VMI's 1986 decision to continue to offer the benefits of single-sex education is plainly consistent with and in direct furtherance of that official state policy. As explained in the 1990 Report of the Commission on the University of the 21st Century to the Governor and General Assembly of Virginia, the "diversity and autonomy" of Virginia's "formal system of higher education" is demonstrated by its "great array of institutions," specifically including the option of "*single-sex*" education. Stips. 37-38 (I JA 82-83; L. 64-65) (em-

[5]The Government asserts (Br. 4) that the Commonwealth previously "denied that VMI's discriminatory policy fostered *any* state objectives." That assertion is patently false. In the district court, the Commonwealth took the position that "VMI's academic mission contributes to the diversity and balance of Virginia higher education, thereby serving the important governmental interest of the Commonwealth in offering its citizens a wide diversity of educational choices." R.5 at 5 ¶ 17 (I JA 35). Thereafter, the Commonwealth chose not to participate separately in the liability proceedings because VMI and the Governor were already represented by different counsel and thus "the separate participation of the Commonwealth would be superfluous," R.68 at 6 (I JA 128; L.19). At *no* time did the Commonwealth change its position that VMI's admissions policy serves important state interests (*see* Pet. App. 81a).

phasis added).[6]

The Government asserts (Br. 21 & n.21) that Virginia has no policy favoring single-sex education because no Virginia statute mandates single-sex admissions policies in higher education.[7] But there is no constitutional requirement that governmental goals must be codified before they can be considered legitimate. VMI's Board exercises the full authority of the Commonwealth in determining VMI's admissions policies, and thus its decision to pursue the benefits of single-sex education and the VMI method necessarily and by definition constitutes state policy.[8] To be sure, the

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[6]The court of appeals noted the 1990 Report's admonition that institutions should "'deal with faculty, staff, and students without regard to sex.'" Pet. App. 153a (emphasis eliminated). The Government misinterprets this statement to mean that Virginia policy opposes single-sex education. Br. 21 n.21. That reading, however, is contrary to the Report's recognition that single-sex institutions further the Commonwealth's interest in diversity. The quoted statement does not address admissions policies at all. Instead, the Report merely reflects the requirements of Title IX, which prohibits gender discrimination in higher education but expressly approves public single-sex schools like VMI. 20 U.S.C. § 1681(a) and (a)(5).

[7]The Government also relies (Br. 21 n.21) on then-Governor Wilder's statement of his "personal philosophy" regarding public single-sex education. R.43 at 4 (I JA 41; L. 7). However, then-Governor Wilder's personal philosophy was *contrary* to the Commonwealth's position, as evidenced by the fact that he was represented by special counsel in this case because of "the conflicts between his interest and that of the Commonwealth." R.68 at 2 (I JA 124; L. 15). And in any event, former Governor Wilder and all current high-ranking Virginia officials support single-sex education at VWIL and VMI. Pet. App. 81a-83a; Va. Br. 31 n.15.

[8]Indeed, the Government concedes this point elsewhere in its brief, asserting (Br. 14) that VMI's admissions policy reflects

[Footnote continued on next page]

Virginia General Assembly has the ultimate authority to change VMI's admissions policy if it deems that policy contrary to the Commonwealth's educational objectives, but it has consistently declined to mandate coeducation at VMI.

Contrary to the Government's suggestion (Br. 22), therefore, Virginia *does* have a policy in favor of single-sex education "at the state level."[9] The fact that Virginia also pursues other educational goals, and thus has devoted most of its educational expenditures to coeducational programs, is fully consistent with that goal. Virginia has continued to provide substantial financial support for women attending private single-sex colleges. Nothing in this Court's precedents suggests that a proffered governmental objective must be ignored unless it has been implemented to the point of excluding the accomplishment of other goals. Virginia provides diverse and beneficial educational programs in accordance with student needs and interests, and VMI's decision to retain its single-sex program is one important element of that overarching goal. Virginia could advance that objective still further by offering a comparable public single-sex opportunity to women, and has done precisely that with the establishment of VWIL, but the fact that Virginia for a time focused its support for women's single-sex education exclusively through its financial assistance to private colleges does not demonstrate that Virginia lacks an interest

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[Footnote continued from previous page]

"the Commonwealth's official view."

[9]Of course, the Constitution does not specify the "level" of government at which an important objective must be asserted. As it happens, VMI's admissions policy is reflective of state policy, but *Hogan* requires only an "'important *governmental* objective[],'" not that the objective be asserted by the State as a whole. 458 U.S. at 724 (emphasis added).

in providing the benefits of single-sex education where educational need, student demand, and institutional interest make that option feasible and important.

II. VMI'S SINGLE-SEX ADMISSIONS POLICY IS SUBSTANTIALLY RELATED TO ACHIEVING IMPORTANT GOVERNMENTAL OBJECTIVES

The Government asserts (Br. 28-31) that VMI's single-sex environment is not substantially related to achieving the benefits of VMI's particular educational method. That assertion is contrary to the factual findings of both courts below. Indeed, the Government does not dispute that VMI's single-sex admissions policy is necessary to the goal of providing the advantages of single-sex education. That concession in itself demonstrates that VMI satisfies the second prong of the *Hogan* test.

The Government argues, however, that VMI cannot justify excluding women who could succeed in its program. That argument is flawed, because VMI could no longer offer the benefits of single-sex education or its particular methodology if it were to become coeducational. *See* Va. Br. 34-36. The Government disputes the latter finding, contending (Br. 28-29) that VMI is "strikingly different" from all other schools in Virginia and that admission of women would thus not interfere with Virginia's goal of offering diverse educational opportunities. That argument simply ignores the loss of diversity and pedagogical advantages that would result from the elimination of public single-sex education in Virginia. Moreover, the courts below found that the very attributes that differentiate VMI's methodology from the residential military educational programs at VPI and other schools would disappear with coeducation, further reducing the diversity of Virginia's educational offerings.[10] In short, "if VMI were to admit women, it

[10]Contrary to the Government's mischaracterization (Br. 29

[Footnote continued on next page]

would become more similar to the military barracks at VPI, so its uniqueness would be lost." Pet. App. 173a.[11]

Conceding that some changes would be necessary if VMI were to become coeducational, the Government next challenges the extent of those changes, asserting that only "minimal" changes would be required that would not "adversely affect" VMI's "military-style program."[12] But the

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n.27), cross-petitioners did not argue in their opening brief that VMI and VPI now offer the same educational experiences. What cross-petitioners argue (Va. Br. 36), and the courts below found (Pet. App. 6a-7a, 172a n.8, 173a), is that VMI's distinctive methodology could not accommodate a coeducational student body, and thus that coeducation would force VMI to modify its methodology to conform to the approach already followed at VPI and West Point.

[11]To be sure, VMI would remain smaller than VPI (Pet. App. 173a-74a), but the Government does not pretend that the constitutional injury allegedly suffered by women is denial of the opportunity to attend a small college.

[12]The Government also asserts (Br. 30 n.28) that the dispute between the parties "focuses . . . on the legal conclusions to be drawn regarding such changes" rather than on the factual question of the extent of the changes that would be required. That assertion is incorrect. The courts below found *as a fact* that coeducation would necessarily change the distinctive aspects of VMI's educational system, including the physical program, the total absence of privacy, and the extreme adversative method, to such an extent that those "'unique characteristics of VMI's program would be destroyed by coeducation.'" Pet. App. 6a-7a, 148a. The Government cannot plausibly maintain that it is raising only a legal challenge to the rulings below, because it refuses to accept these *factual* findings about the extent of the changes that would occur.

Government cannot simply substitute its opinions for the amply supported factual findings below. The record is clear that the strict egalitarianism that lies at the core of the adversative method would necessarily be lost with coeducation. Pet. App. 146a-47a, 237a-38a.

The Government mislabels this factual *finding* as nothing more than an "assertion" of cross-petitioners, and characterizes it as "absurd." Br. 31 n.29. There is nothing "absurd," however, about the fact that VMI would be forced to adopt different physical fitness standards and grading criteria for men and women, just as West Point has done. Pet. App. 146a-47a, 235a-36a; I Tr. 489, 520-22, 625-26 (I JA 736, 767-69, 872-73). As West Point's experience demonstrates, there are inevitable consequences of these necessary gender-based differences in treatment. Pet. App. 146a-47a.[13] Nor was it "absurd" for the courts below to find, based on expert testimony and the experience of the service academies, that the creation of privacy rights for gender classes and the inevitability of cross-gender relationships would further eviscerate the egalitarianism that is so crucial to the effectiveness of the VMI method. Pet. App. 147a, 233a, 237a-39a; *see also* I Tr. 514 (I JA 761).[14]

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[13]A 1990 West Point study, for example, found continuing resentment and perceptions of inequality, including a belief on the part of most women cadets that they are treated differently and are not fully accepted. I PX 123 (II DX 231); I Tr. 528-29, 533-34 (I JA 775-76, 780-81).

[14]The Government errs in analogizing VMI's successful integration of black students to the impact of coeducation. None of the aspects of VMI's system characterized as unique by the Government or the courts below had to be changed to accommodate black male students; the physical standards, the strict egalitarianism, the total absence of privacy, and the extreme adversative system were entirely unaffected. The service academies and the courts below found the reverse to be true of

[Footnote continued on next page]

The Government makes no effort to refute the finding below that VMI's adversative method, including the intentional intimidation and pressures inflicted on new students by upperclassmen, could not survive in a coeducational environment. Pet. App. 6a-7a, 146a-47a, 172a n.8, 237a-39a. Instead, the Government brushes aside that finding on the ground that it purportedly rests on an impermissible concern for "decency" between the sexes. In reality, however, that finding reflects the actual experience of the service academies and is based on expert testimony demonstrating that it is unrealistic to expect late adolescents to engage in cross-gender harassment in an intense and pressure-laden environment without producing tensions and perceptions of unequal treatment that are wholly incompatible with the VMI method. Pet. App. 147a, 238a-41a. The coeducational setting inevitably entails sexual distractions and attractions, posturing, emotional involvements, and jealousies not found in a single-sex environment, and it ignores reality to ask young men and women to participate in institutionalized peer-induced stress and intimidation while avoiding the appearance of impermissible sexual harassment. *See* Va. Resp. Br. 45-46 & n.35.

The Government also contends that there is no governmental interest in preserving VMI's system in its present form. In making this contention, the Government seeks to have it both ways. On the one hand, it argues (Br. 13) that women are denied an important educational opportunity because they cannot enjoy the "unique" VMI program. On the other hand, it argues (*id.* at 29-30) that the changes required for VMI to become coeducational are inconsequential because no constitutional significance can be at-

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coeducation.

tached to those elements of VMI's method that would have to be rejected -- even though those elements are precisely what distinguishes VMI's system from the programs already offered to women at VPI and elsewhere. The Government's argument is at war with itself.

In any event, Virginia does have a legitimate and important interest in maintaining VMI's present system. As the record and findings below demonstrate (*see* Va. Br. 14-18, 26-28), VMI's program is particularly successful in educating the students who choose it, and both its single-sex nature and the adversative system are essential to that success. To be sure, other educational programs (like that at VWIL) can achieve equivalent results with other students, but VMI's program has been shown to be optimal for and attractive to a substantial number of male students (as VWIL's program has been shown to be for female students). The Government's insistence on coeducation would thus frustrate Virginia's legitimate interest in providing diverse educational opportunities in response to differing educational needs and interests and deny all students the opportunity to benefit from single-sex education.[15]

III. VMI'S SINGLE-SEX ADMISSIONS POLICY DOES NOT DENY EDUCATIONAL OPPORTUNITY TO WOMEN STUDENTS

The Government incorrectly contends (Br. 13) that cross-

[15]The Government offers its opinion (Br. 31) that the benefits of attending VMI "would probably be enhanced, rather than diminished," if it were to become coeducational. That pronouncement, however, is impossible to square with the findings below. *See* Pet. App. 149a-51a, 176a, 225a. The Government's persistence in substituting its own unsubstantiated beliefs for the judgments of professional educators and the factual findings below underscores the Government's inability to prevail on the actual record in this case.

petitioners seek to preserve VMI "without offering any alternative whatever to women." Virginia provides women students an opportunity to receive a college education with public financial assistance at a wide variety of institutions, large and small, public and private, coeducational and single-sex. Those institutions offer to women every academic course and degree available at VMI and more, including the opportunity to receive military training and pursue a military career. And both the public institutions of higher education and the private single-sex colleges in Virginia (all of which receive substantial state financial assistance) enroll more women than men. *See* Va. Br. 5-10, 45-46.[16]

In addition, Virginia offers women the opportunity to participate in VPI's coeducational barracks-based Corps of Cadets program. While the VPI program does not replicate VMI's adversative method, it does place similar emphasis on physical and mental rigor, character development, and military training and discipline. *See* Va. Br. 9-10; Pet. App. 214a-18a; Stips. 49-53 (I JA 94-98; L. 76-80). The Government errs in asserting (Br. 29 n.27) that VPI "lacks the traditions, prestige and alumni ties that VMI enjoys." VPI has been listed among the Nation's finest undergraduate institutions, and its engineering program is one of the very best in the Nation. Stips. 41-42 (I JA 86-87; L. 68-69); U.S. NEWS & WORLD REP. 138 (Sept. 18, 1995). The VPI Corps also has a proud tradition of military service. VPI was designated as one of 12 "distinguished military

[16]The Government argues (Br. 28 & n.26) that Virginia's extensive financial support for women attending private single-sex colleges is irrelevant, but offers no support for that counter-intuitive proposition. The Constitution reflects no preference for public over private education. As long as Virginia uses its tax-generated revenue to educate both men and women overall, the Equal Protection Clause is indifferent to the mix of public and private institutions used to offer those educational benefits.

colleges" by the War Department after World War I in recognition of the contributions made by its graduates, and VPI alumni have held numerous positions of senior leadership in the military and have received six Congressional Medals of Honor. Stips. 49-50 (I JA 94-95; L. 76-77).

The Government's claim thus reduces to the assertion that women cannot be denied access to the particular educational methodology offered at VMI. But that argument simply ignores the findings below that women will not obtain the benefits of VMI's methodology if VMI becomes coeducational. Instead, that methodology will inevitably be replaced by a system analogous to that already offered to women through the VPI Corps of Cadets.[17]

The Government challenges (Br. 33-35) cross-petitioners' showing that there is insufficient demand among women to make practicable a single-sex program utilizing VMI's ad-

[17]The Government also argues that women are improperly denied the benefits of access to VMI's allegedly powerful alumni network. The only evidence cited to support the Government's exaggerated characterization of the influence of VMI's alumni is the remedial-phase testimony of one of its experts, Dr. Alexander Astin. *See* Br. 13 (citing II Tr. 1227-28); II Tr. 1237-38 (pages of transcript where cited testimony actually appears). Dr. Astin's testimony, however, was largely discredited by the district court. Pet. App. 70a-71a. And in any event, the Government points to no basis for believing that the influence of VMI's alumni approaches that of the graduates of other institutions in Virginia. Of the 140 members of the 1994-95 Virginia General Assembly, for example, twelve received their undergraduate degrees from VPI, eight from the College of William & Mary, seven from the University of Virginia, and only one from VMI. *See* MANUAL OF THE SENATE, GENERAL ASSEMBLY OF VIRGINIA 74-100 (1994-95); VIRGINIA HOUSE OF DELEGATES MANUAL 95-188 (1994-95).

versative method.[18] Cross-petitioners introduced extensive evidence to that effect, however, and the district court and court of appeals found that evidence persuasive. Pet. App. 27a, 73a, 75a n.12; *see* Va. Br. 43-44 & n.22; L. 300.[19]

This evidence demonstrates that Virginia better serves women students by devoting its scarce educational resources to programs of interest to larger numbers of them

[18]The Government also claims (Br. 32 n.30, 33-34) that cross-petitioners waived this argument and that evidence introduced at the remedial phase should not be considered in reviewing the liability determination. The demand issue was fully litigated during the remedial phase, however, and this Court reviews "the entire case," not merely one portion of it. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). In any event, Virginia and VMI are respondents in No. 94-1941, and as such are entitled to defend the judgment below on any ground supported by the record. *See Schweiker v. Hogan*, 457 U.S. 569, 585 n.24 (1982); *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); *see also* 94-1941 Br. in Opp. 18 n.15.

[19]The Government's attempt to reargue the facts is both improper and without merit. Even though the Nation's ROTC programs have been open to women for many years, the number of women attending even *non*-adversative residential military programs is quite small (250 nationwide in 1990), and interviews with women cadets reveal that only a tiny fraction of them would have considered an adversative program like VMI's. II Tr. 613-15 (II JA 743-45); I DX 62L (L. 233). Also significant is the fact that the experts in women's education who designed VWIL found little or no demand for a women's program identical to VMI. II Tr. 127, 340-41 (II JA 473, 598-99). The Government's reliance on female attendance at West Point is misplaced, both because West Point does not use the adversative method and because VMI (unlike West Point) cannot offer free tuition, room and board, and a salary to its students, nor can it guarantee them an active-duty commission upon graduation.

than it would by attempting to create a program for women identical to that offered to men at VMI, an attempt that would be doomed to fail because such a program could not attract the necessary critical mass of interested students. The Government's contrary argument rests entirely on cases involving *racial* discrimination. Unlike racial segregation, which is abhorrent, inherently suspect, and which offers no valid educational benefits, the gender classification at issue in this case provides substantial and proven educational advantages that would be lost if coeducation were required. The cases cited by the Government are irrelevant to a proper legal analysis of the issues in this case.[20]

IV. THE GOVERNMENT'S VIEW OF THE LAW WOULD EFFECTIVELY PRECLUDE ALL PUBLIC SUPPORT FOR SINGLE-SEX EDUCATION

The Government contends that adoption of its view of the law "will not . . . invalidate single-sex public education in all circumstances." Br. 26. It is unable, however, to point to any circumstance in which its approach would permit public single-sex education, with the "possible" exception of instances (now virtually nonexistent) in which single-sex education is necessary to "compensate" for past discrimination. *Id.* at 11. Thus, adoption of the Government's view of the law would necessarily lead to elimination of those public single-sex programs that now exist and frustrate the worthy efforts of public educators across the country who

[20]Those cases are also inapposite because they do not involve situations in which the ability to offer a particular program depends on the willingness of a significant number of other individuals to participate in that same program. VMI's adversative method, which depends on the active participation of numerous students as leaders, disciplinarians, mentors, and peers, cannot possibly be implemented in the absence of a sufficient number of other students all seeking the same experience.

are achieving success with single-sex programs at all levels of the educational system.[21]

As previously explained (Va. Br. 41-42), the Government's strained reading of the Constitution also threatens the survival of private single-sex schools. The fact that public aid may not convert private colleges into state actors is irrelevant, because this Court has held that government *itself* violates the Constitution by providing educational aid to private schools whose discriminatory admissions policies would violate equal protection if practiced by the government. *E.g.*, *Norwood v. Harrison*, 413 U.S. 455 (1973).

The Government's attempt to distinguish *Norwood* is unpersuasive. That decision does not, as the Government would have it (Br. 37), rest on a determination that Mississippi "was under a federal desegregation order, and . . . therefore had an affirmative constitutional duty to dismantle its segregated system of education." To the contrary, the *Norwood* Court accepted the "finding that Mississippi's public schools '*were fully established as unitary schools*,'"

[21]The Government asserts (Br. 26-27 n.25) that public single-sex education is "extremely rare," and that Title IX prohibits most single-sex classes in coeducational schools. It is beyond dispute, however, that the number of single-sex programs in public school districts across the Nation is increasing (*see* Va. Br. 39-41; *see also* Br. *Amici Curiae* of Women's Schools Together, Inc., at 21-22, 27-28 & n.41; Br. *Amici Curiae* of Dr. Kenneth E. Clark, *et al.*, at 12-13), and a bill is currently pending in Congress that would authorize additional experimentation with single-sex programs at the elementary and secondary levels. *See* S.B. 829 (introduced May 18, 1995, by Sen. Hutchison). The growing consensus among educators that single-sex education is optimal for some students in some settings suggests that this trend will continue unless the Government succeeds in mandating coeducation as the only permissible approach for all public schools.

but concluded that the State's compliance with constitutional requirements in its public school system did not justify its aid to discriminatory private schools. 413 U.S. at 467 (emphasis added).[22] Thus, the Government offers no colorable basis for its assertion that public aid to private single-sex schools could survive a ruling that the Equal Protection Clause prohibits public single-sex education like that offered at VMI and VWIL.[23]

CONCLUSION

The court of appeals' finding of liability should be rejected, and the judgment below should be affirmed on that ground.

January 3, 1996 Respectfully submitted.

[22]The Government's reliance on *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), is equally unpersuasive. Indeed, the *Norwood* Court expressly distinguished *Moose Lodge* on the ground that it involved a form of generalized governmental assistance that could be obtained only from the State. 413 U.S. at 465. Unlike liquor licenses, police protection, and the like, public financial aid for students attending private single-sex colleges is "provided only in connection with schools" and is "a form of assistance readily available from sources entirely independent of the State." *Id.*

[23]Any attempt to distinguish *Norwood* would be particularly difficult if, as the Government now requests, strict scrutiny were to be applied to gender classifications. Of course, that issue is not properly presented in this case, and the Government cannot identify any sufficient basis for rejecting the intermediate-scrutiny standard for gender classifications. *See* Va. Resp. Br. 47-50.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

COMMONWEALTH OF VIRGINIA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

As we argue in our opening brief, there are three principal reasons why respondents' remedy fails, each of which is sufficient to require reversal here. *First*, the presumptive remedy for unconstitutional sex-based exclusion is to halt the use of the exclusionary classification; thus, absent the most persuasive reasons, the remedy for VMI's unconstitutional exclusion of women should be the termination of that policy. Respondents have virtually ignored the fact that this case presents a remedial question. Respondents have not justified continuing to exclude women from VMI, nor have they shown that their proposed remedy would erase, insofar as practicable, all the effects of their unconstitutional exclusion of women from VMI. Established remedial principles thus require that VMI's exclusionary admissions policy be enjoined. 94-1941 U.S. Br. 20-32, 48.[1] *Second*, VMI and VWIL are not just

[1] Respondents repeatedly argue (see, *e.g.*, Br. 17, 28 n.23, 30, 32 n.25) that this Court should defer to the district court regarding

separate single-sex programs for men and women, but programs that are substantially *different*, and meaningfully *unequal*.[2] The differences between the programs are, moreover, based on unconstitutional overgeneralizations and stereotypes.[3] *Third*, VMI is a well-established institution, and VWIL is new. Even if the methodology and other tangible benefits of VWIL could be made the same as VMI's, a substantial part of the value of VMI's education and degree derives from VMI's distinctive history, traditions, prestige, and alumni support. The VWIL plan cannot replicate the intangible benefits of VMI, and will reinforce rather than eliminate the state-sponsored stigma associated with excluding women from VMI.[4]

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the remedy, and should defer to Virginia's design of its educational system. But there is no modern case or principle of which we are aware that would allow the crucial questions of whether VWIL and VMI are equal, and of whether the lower courts relied on impermissible sex-based stereotypes, to be reviewed under a deferential standard. Rather, those questions call for the same kind of "independent examination of the record as a whole, without deference to the trial court," as this Court has conducted in the First Amendment context. *Hurley* v. *Irish-American Gay Group of Boston*, 115 S. Ct. 2338, 2344 (1995). Deference to the State regarding the requirements of the Equal Protection Clause where any heightened level of scrutiny applies would be at odds with the entire history and purpose of the Fourteenth Amendment.

[2] See pages 5-9, *infra* (comparison chart); 94-1941 U.S. Br. 2-5 (describing VMI), 8-11 (describing VWIL).

[3] See pages 10-15, *infra*; 94-1941 U.S. Br. 9, 12, 14, 18, 37-40; 94-2107 U.S. Br. 9-10, 14-15, 18-20, 35 (discussing unconstitutional stereotyping).

[4] See 94-1941 U.S. Br. 16, 20, 22-25, 48 n.36; 94-2107 U.S. Br. 13-15, 34. Respondents cannot deny the vast "intangible" differences between VMI and VWIL. Although they attempt (Br. 27 n.22) to distinguish *Sweatt* v. *Painter*, 339 U.S. 629 (1950), on the ground that it involved a racial classification, they have offered no explanation why "those qualities which are incapable of objective measurement but which make for greatness in a * * *

1. Respondents misstate (Br. 15) the issue in this case as "whether a State may offer the option of single-sex education to both men and women as part of a diverse and primarily coeducational system of higher education." That is not the issue. The question presented here is whether a State may remedy the unconstitutional exclusion of women from an established and celebrated military-style public college by setting up a new, substantially different, non-military, women-only leadership program at a private women's liberal arts college, and whether it can

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school," *id.* at 634, would be of less importance to women than to African Americans.

Respondents asert (Br. 26 n.21) that other colleges in Virginia have greater *academic* prestige than VMI, and that Mary Baldwin College's *academic* reputation is "comparable" to VMI's. As the district court recognized, however, "[t]he academic program (aside from physical education) at VMI is not unique." Pet. App. 200a. VMI's uniqueness derives instead from its "rigorous military training" and "barracks-centered lifestyle." *Id.* at 173a. VMI enjoys an established reputation and prestige *as a rigorous military school*, and it cannot be disputed that Mary Baldwin College and VWIL utterly lack those attributes. Respondents now seek to minimize VMI's reputation, but they insisted in the district court that VMI is "one of the nation's unique and most respected colleges," which "consistently appears on all lists of the nations [*sic*] finest colleges while maintaining the spartan lifestyle of its corps of cadets [and] offering quality education within the disciplined framework of a military environment." R. 152 (VMI Defendants' Proposed Findings of Fact and Conclusions of Law (liability phase) (Apr. 26, 1991)) at 18 (¶ 91).

Respondents also emphasize (Br. 27) that VWIL women will have "access" to the VMI alumni network. But artificially "including" VWIL women in a VMI network cannot grant them the respect that VMI alumni have for one another "[a]s a consequence of completing the rigorous tasks, succeeding, and actually graduating from VMI." Pet. App. 205a. VMI's alumni network is unusually loyal precisely because its members are bonded to one another and to their school by the common experience they endured as students. Only if women are allowed to share that experience with men will they have a chance of standing on equal footing among VMI alumni.

justify the admitted substantial differences between the men's and women's programs based on stereotyped notions of what is appropriate for "most" women.

Respondents assert (Br. 18) that we seek an interpretation of the Constitution that would "forbid public single-sex education." That assertion is incorrect. The unconstitutionality of VMI's exclusionary policy and the inadequacy of respondents' remedy does not depend on the theory that single-sex education is unconstitutional.[5] Nor does this case present the situation, referred to in *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 728 (1982), of public single-sex education that is justified in a particular case on remedial grounds.[6] In view of the history and purposes of VMI and VWIL, as well as the remedial posture of this case, VMI and VWIL also cannot possibly be characterized as constituting single-sex components of a nondiscriminatory system.

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[5] See Pet. 16 & n.13; 94-1941 U.S. Br. 45; 94-2107 U.S. Br. 24-25.

[6] Respondents suggest that VWIL is constitutional for compensatory reasons. Br. 22, 36-37; but see *id.* at 39 n.29 (questioning whether single-sex education can ever be justified on compensatory grounds). VWIL was, in fact, established not to compensate women, but in an attempt to preserve VMI as an exclusively male institution. L. 318 (reciting the reason for VMI's support of VWIL as "[t]o preserve VMI"); Pet. App. 42a-43a (Phillips, J., dissenting) (the "overriding purpose [of VWIL] is not to create a new type of educational opportunity for women, * * * nor to further diversify the Commonwealth's higher education system[,] * * * but is simply by this means to allow VMI to continue to exclude women in order to preserve its historic character"). But even if respondents had shown that VWIL was established as a form of affirmative action for women, the existence of VWIL could not justify continuing to exclude qualified women from VMI. The notion that *some* women may need an affirmative action program does not mean that such a program can be the *only* alternative for women who are ready and willing to compete alongside men without it. This Court has never approved an affirmative action plan as a justification for excluding qualified women or minority-group members from a non-affirmative-action alternative.

2. Respondents assert that "as a factual matter it is simply not true that women are denied the educational benefits afforded to men at VMI," Br. 38, and that VWIL provides "the[] very same benefits to its students" as VMI provides to the men it admits, Br. 24. Those assertions are flatly contrary to the factual findings of the district court. The district court acknowledged that "the United States showed unequivocally that the VWIL program differed from VMI in many ways." Pet. App. 68a. The court correctly concluded that VWIL "differs substantially from the VMI program." *Id.* at 55a; see also *id.* at 26a (court of appeals' conclusion that VMI and VWIL "differ in approach"). The following chart comparing characteristic elements of the two programs makes clear that they are sharply different in virtually all material respects:

1. Military Model	
VMI provides "military-type training." Pet. App. 5a. The military system characterizes life at VMI. L. 33. Cadets live within a pervasively military framework. Pet. App. 141a, 200a.	VWIL "w[ill] not rely on the pervasive military life," Pet. App. 10a, but will instead provide "special leadership training," *id.* at 5a. Mary Baldwin Task Force "determined that a military model * * * would be wholly inappropriate for educating and training most women for leadership roles." *Id.* at 63a. Mary Baldwin "is not a military school." *Id.* at 126a.
2. Educational Methodology	
VMI uses "adversative" system that tests students to their limits and aims to leave them with a sense of accomplishment and knowledge of their true capacities. Pet. App. 191a-193a.	"VWIL program differs from VMI in methodology since VWIL would not rely on the * * * adversative method[] to achieve its goals." Pet. App. 10a. Instead, "the VWIL concept proposes a cooperative method which reinforces self-esteem rather than the leveling process used by VMI." *Id.* at 63a-64a. See also *id.* at 67a.

3. Residential Life

All cadets are required to live in the barracks all four years. "[T]he most important aspects of the VMI educational experience occur in the barracks," which are "crucial to the VMI experience." The barracks are stark and unattractive. Pet. App. 197a-199a.

There will be no barracks at VWIL. "The residential life for VWIL students will vary significantly from the residential life of VMI students." Pet. App. 66a. VWIL students are required to live together in the VWIL house for one year only, *ibid.*, and may live off-campus, 94-1667 & 94-1717 (*VMI II*) C.A. App. 505. Neither the VWIL house nor any other Mary Baldwin dorm is operated on a military format. Pet. App. 66a-67a; *VMI II* C.A. App. 502-504. The Mary Baldwin dorms are plush and comfortable Pet. App. 127a.

4. Peer Group and Students' Relationship to Community

VMI has approximately 1300 students, all of whom are required to participate in VMI's military-style educational program. Pet. App. 5a. Students at VMI are "totally removed" from the larger community." *Id.* at 199a.

VWIL is planned and funded based on the expectation of approximately 25-30 students, who will participate in a women-only leadership program within the context of a predominately women's liberal arts college with approximately 1300 students. Pet. App. 10a, 123a. VWIL students will not be isolated from the larger community. *Id.* at 115a.

5. Privacy

VMI students are subject to a "total lack of privacy in the barracks," and to "constant scrutiny" and "minute regulation of individual behavior." Pet. App. 140a.

VWIL students' privacy will be respected, as it ordinarily would be in a student dorm. Pet. App. 128a.

6. "Rat Line"

First-year students are referred to as "rats" and are "treated miserably for the first seven months of college." Pet. App. 194a. The rat line includes "indoctrination, egalitarian treatment, rituals * * *, minute regulation of individual behavior, frequent punishments, and use of privileges to support desired behaviors." *Id.* at 194a-195a.

VWIL will not use a rat line or any similar feature. Pet. App. 64a.

7. Honor Code

VMI's honor code "dominates all facets of institutional life," and provides that a cadet "does not lie, cheat, steal nor tolerate those who do"; students who violate it are expelled upon their first infraction. Pet. App. 197a.

VWIL will be governed by Mary Baldwin's preexisting Honor System, which is not enforced with the single sanction of expulsion. Pet. App. 115a; *VMI II* C.A. App. 649-650.

8. Uniforms

VMI cadets are required to wear uniforms at the Institute at all times. L. 34.

VWIL students will not wear uniforms during the day except while participating in ROTC or Virginia Corps of Cadets activities. Pet. App. 111a.

9. Military Drill

VMI cadets are required to participate in daily military formations and drill at VMI, in addition to drilling with ROTC and Virginia Corps of Cadets. L. 273-274.

VWIL students will not participate in military formations or drill, other than in ROTC or for ceremonial occasions with the Virginia Corps of Cadets. *VMI II* C.A. App. 502, 643.

10. Academic Program

VMI offers Bachelor of Arts and Bachelor of Science degrees in liberal arts, science, and engineering. Pet. App. 200a.

Mary Baldwin College/VWIL will offer no Bachelor of Science degree, and will not offer engineering classes or degrees on campus or at public expense. "MBC does not have a math and science focus." Pet. App. 131a.

11. Prestige, History, and Tradition

VMI is nationally known as a military school. VMI's "success and reputation are uncontroverted," and "it is apparently that very success in producing leaders that has made admission to VMI desirable to some women." Pet. App. 138a. VMI has traditions associated with its military system, like the "rat bible" (L. 158-191, 263-264) and "breakout" (L. 277-281).

"[T]he VWIL degree from Mary Baldwin College lacks the historical benefit and prestige of a degree from VMI." Pet. App. 27a. Mary Baldwin's reputation is as "an excellent small liberal arts college for women" emphasizing "liberal disciplines." R. 259a (United States' Proposed Findings of Fact and Proposed Conclusions of Law: Remedial Trial (Mar. 8, 1994)) at 63 (¶ 414). Mary Baldwin has fun-oriented, nonmilitary traditions, like Apple Day and Peanut Week. *VMI II* C.A. App. 633-634; see also R. 259a, at 26 (¶ 177), 55 (¶ 366).

12. Alumni Network

VMI has "thousands of alumni," Pet. App. 137a, and its alumni network is "enormously influential," especially in male-dominated fields of engineering, military, business, and government. 94-1667 & 94-1717 (*VMI II*) Tr. 1227-1228; see also Pet. App. 137a-138a.

VWIL is a new program with no alumni. VWIL students would have "access" to VMI placement services. Pet. App. 120a-121a.

13. Endowment

VMI has a $131 million endowment, the largest on a per-student basis of any undergraduate college in the United States, public or private, and it has received an additional $220 million in future commitments. Pet. App. 130a.

Mary Baldwin College has a $19 million endowment, and $35 million in future commitments. Pet. App. 130a. VMI has pledged to pay Mary Baldwin an additional $5.5 million for VWIL (which Mary Baldwin will retain whether or not VMI becomes coeducational by court order or otherwise). L. 319-320.

14. Relation to the State

VMI is a state college. Pet. App. 138a.

VWIL is a publicly supported program run by, and on the campus of, a private college. Pet. App. 8a.

In short, VMI is a rigorous military school; VWIL is not. VMI is an established and renowned institution with a powerful alumni network; VWIL is a new, small program that is virtually unknown, except for its connection with this litigation. VWIL may employ valuable methodologies that could be beneficial to many students, both women and men, for whom VMI is unsuitable. VWIL does not, however, remotely constitute an adequate educational program for those women who want to attend VMI, and are qualified for and would benefit from its very different program.[7]

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[7] Respondents assert (*e.g.*, Br. 2) that our opening brief contains an inaccurate discussion of the facts. That is not true. Respondents, for example, dispute (Br. 4 n.2) that they selected the remedial Task Force, but our point is not whether they delegated that job to someone of their choosing or selected each member themselves, but that neither the United States nor the court was involved in the selection of the Task Force and the development of the VWIL remedial proposal. Respondents also take issue (Br. 5 n.4) with the assertion that the Task Force did not consult anyone at VMI in planning VWIL's curriculum. But the President of Mary Baldwin College acknowledged at trial that, in designing the curriculum for VWIL, neither she nor her staff consulted with anyone at VMI. *VMI II* C.A. App. 653. Respondents dispute (Br. 9 n.9) the statement that VWIL will have no military framework other than the ROTC program. The Dean of Mary Baldwin College testified, however, that VWIL's "military component is a program in ROTC." *VMI II* C.A. App. 450. Respondents further assert (Br. 10 nn.11-12) that we incorrectly stated that VWIL will not use VMI's dyke and class systems. But the description of VWIL's mentoring program and class system makes clear that they are sharply different from those systems at VMI. See Pet. App. 115a-116a (describing VWIL) and *id.* at 196a (describing VMI). Respondents contend (Br. 8 n.8) that, in addition to Army ROTC, VWIL students will have access to Air Force and Navy/Marine ROTC. That assertion,

The court of appeals approved the remedial plan, not because it believed that VWIL and VMI were equal, but because, under its "special intermediate scrutiny test," it expressly disavowed any requirement of equality. Pet. App. 17a-18a & n.*. Under the third prong of that test, the court required only that separate programs be "substantively comparable," or "aimed at achieving similar results." *Id.* at 17a, 26a. The court thus approved VWIL despite its major differences from VMI because it believed that the two programs' "missions are similar and the goals are the same," even though "[t]he mechanism for achieving the goals differ." *Id.* at 26a. As we have shown, the court of appeals' test is far too permissive of different treatment based solely on sex. Pet. 18-19; 94-1941 U.S. Br. 47-48 & n.35.

3. Respondents seek to justify the differences between VMI and VWIL by asserting (Br. 28-38) that those differences are not based on improper stereotyping. In our opening brief, we have reviewed at length the impermis-

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however, does not contradict the statements regarding ROTC in our opening brief. See U.S. Br. 9-10 & n.6 (recounting that the VWIL military framework is provided by ROTC, and that Mary Baldwin had only one student in ROTC when VWIL was planned, and no Mary Baldwin student was commissioned during the preceding three years).

Respondents cite to Defendants' Third Status Report to support assertions regarding the nature of the VWIL program. See Resp. Br. 7 n.6, 9, 10; see also *id.* at 3, 8 & n.7 (citing to earlier status reports reprinted in 94-1941 Br. in Opp. App.). This and other status reports were filed in the district court well after that court approved the VWIL remedy based on the litigated record. Such postjudgment factual submissions are not part of the record in this case; the case must be decided on the record that was before the district court and the court of appeals when they approved the VWIL remedy. See R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 555 (7th ed. 1993) (citing cases). Petitioner has had no opportunity to test in adversary proceedings the accuracy and completeness of assertions made in those status reports.

sible stereotypes that underlie respondents' remedial proposal. See 94-1941 U.S. Br. 37-44. Respondents attempt to minimize the stereotypes that their own experts employed by referring to quotations from those experts as mere "snippets" that are "contradicted" by the court's findings (Br. 30) (or, even more inexplicably, by dismissing their own experts' testimony as the United States' "opinions" (Br. 29)). The district court, however, expressly relied on sex-based generalizations proffered by defense experts. See, *e.g.*, Pet. App. 64a, 73a-76a, 223a-225a.

Respondents concede (Br. 29) that the generalizations made by their experts and accepted by the courts were overbroad. Most college-aged women are not depressed, pathologically self-disciplined to the point of anorexia, emotionally fragile, and passive, or more dating- and marriage-oriented than men, see 94-1941 U.S. Br. 9, 37-44.[8] Indeed, many women would prefer VMI, Pet. App. 76a, can do everything that is currently required of male cadets there, *id.* at 170a, and would "thrive" in VMI's current environment, *id.* at 172a.[9]

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[8] There are, as the district court found, "significant areas of developmental overlap" between men and women. Pet. App. 224a. The uncontradicted testimony on psychological similarities between the sexes was that women and men show much greater similarity than difference, and that sex is not an accurate predictor of *any* psychological traits. See R. 259a, at 6 (¶¶ 30-31). Nor does sex correlate with any particular learning style. *Id.* at 4-5 (¶¶ 21-27).

[9] Respondents describe the United States as condemning any sex-based generalization "if there exists a single person" for whom the generalization is not accurate. Br. 17; see *id.* at 32, 41. The reality is that, even with its current, men-only admissions policy in place, VMI received over 300 inquiries in two years from women interested in attending, Pet. App. 141a, 229a, and the district court found that, if VMI admitted women, 10% of its student body—or approximately 130 students—would be women, *id.* at 232a. Respondents also ignore the finding that "15% of the females in the [projected] applicant pool could successfully meet the requirements of the current VMI physical fitness test." *Id.* at 234a. In

Contrary to respondents' contention (Br. 16), this Court's decisions do not support respondents' reliance on sex-based stereotypes. No modern equal protection case has relied on overbroad, sex-based generalizations completely to foreclose to individuals, solely on the basis of their sex, an opportunity for which they were otherwise qualified. See 94-2107 U.S. Br. 15-16; 94-1941 U.S. Br. 42-44. The cases respondents cite (Br. 32-34, 41 & n.31) dealt either with sex-based classifications justified based on legal differences between women's and men's status that were not challenged,[10] or with affirmative action programs that did not foreclose opportunity to either men or women.[11]

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any event, even if only one qualified woman sought to attend VMI, respondents have failed to offer any constitutionally sufficient justification for excluding her solely on the basis of her sex.

[10] Sex-based classifications that depend on underlying unchallenged sex-based laws are not overbroad where the underlying laws apply categorically to all members of one sex. Virtually all of the cases respondents cite in support of their reliance on sex-based stereotypes are of this type. For example, in *Schlesinger* v. *Ballard*, 419 U.S. 498, 508 (1975), the Court upheld a Navy up-or-out policy that gave women officers longer to achieve a promotion or face mandatory discharge because unchallenged "current restrictions on women officers' participation in combat and in most sea duty" categorically restricted women's, but not men's, promotional opportunities. In *Rostker* v. *Goldberg*, 453 U.S. 57, 78 (1981), the Court upheld the sex-based exclusion of all women from the draft, concluding that "[m]en and women, because of the combat restrictions on women"—which plaintiffs did not challenge—"are simply not similarly situated for purposes of a draft or registration for a draft." Similarly, in *Parham* v. *Hughes*, 441 U.S. 347, 355 & n.6 (1979) (plurality opinion), the Court upheld a Georgia statute under which a father who has not legitimated his child cannot sue for her wrongful death, because under state law "only a father can by voluntary unilateral action make an illegitimate child legitimate," and the legitimation statute's applicability only to men was not challenged. See also *Heckler* v. *Mathews*, 465 U.S. 728, 746-747 (1984) (upholding temporary transition rule designed to protect reasonable reliance on invalidated sex-based social security statute).

[11] Cases that have permitted sex-based classifications in the context of affirmative action programs do not support respondents'

Respondents assert (Br. 16) that the Equal Protection Clause permits reliance on sex-based "psychological and sociological norms." This Court, however, correctly looks upon sex-based psychological and sociological generalizations with particular skepticism. "[P]roving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." *Craig* v. *Boren*, 429 U.S. 190, 204 (1976). General conclusions about the psychology or sociology of an entire sex reflect gender roles that have been substantially socially constructed, and that bear the deep imprint of decades of traditional ways of thinking about men and women.

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reliance on sex-based generalizations in this case. Affirmative action that was designed to remedy sex discrimination, such as was at issue in *Califano* v. *Webster*, 430 U.S. 313 (1977) (per curiam), addresses harms that are by their nature class-based. A class-based response for such harms may accordingly be necessary. See *Adarand Constructors, Inc.* v. *Peña*, 115 S. Ct. 2097, 2117 (1995). The law at issue in *Webster* (which had been repealed as no longer needed by the time the case was decided), allowed women to exclude three more low-earning years than could men from the average salary level used to calculate their social security benefits. The Court upheld that sex-based difference because it "was deliberately enacted to compensate for particular economic disabilities suffered by women" in the job market, and it "work[ed] directly to remedy some part of the effect of past discrimination." 430 U.S. at 318, 320. Perhaps more importantly, the kinds of affirmative action that this Court has upheld—unlike VMI's exclusionary admissions policy—do not completely foreclose to one group the opportunities that are affirmatively extended to another. Thus, under *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990), and *Regents of Univ. of California* v. *Bakke*, 438 U.S. 265 (1978), non-minorities remained eligible to own the same radio stations and attend the same medical school that affirmative action programs sought to also make available to members of racial minorities. And under *Johnson* v. *Transportation Agency*, 480 U.S. 616 (1987), even though women's sex was considered as a "'plus' factor," *id.* at 656 (O'Connor, J., concurring in the judgment), men remained eligible to compete for and fill any of the traditionally sex-segregated jobs to which the affirmative action plan applied.

See 94-1941 U.S. Br. 43-44. Since 1976, when this Court in *Craig* adopted an elevated standard of review of sex-based classifications, it has *never* upheld an exclusionary classification based on a psychological or sociological generalization. See, *e.g.*, *J.E.B.* v. *Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1428 (1994) (rejecting generalization that women "hold particular views simply because of their gender"); *Califano* v. *Westcott*, 443 U.S. 76, 89 (1979) (rejecting generalizations that fathers have the "primary responsibility to provide a home and its essentials" and that mothers are the "center of home and family life"); *Caban* v. *Mohammed*, 441 U.S. 380, 389 (1979) (rejecting generalization that biological mothers bear a more intimate relationship with their children than biological fathers); cf. *Roberts* v. *United States Jaycees*, 468 U.S. 609, 628 (1984) (condemning "generalizations about the relative interests and perspectives of men and women").

Respondents attempt to distinguish the psychological and sociological generalizations upon which they rely as "real" sex differences and "not stereotypes." Br. 28. Respondents evidently do not understand the meaning of the term "stereotype." This Court has firmly established that a State cannot rely on generalizations—even if they are factually supportable as generalizations—to exclude individual women or men from a valuable opportunity solely because of their sex. In this regard, respondents ignore entirely the Court's recent decision in *J.E.B.*, 114 S. Ct. at 1427 n.11, which emphasized that, even if there is a measure of truth in a gender stereotype, the State cannot rely on the stereotype to "mak[e] judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination." See also 94-1941 U.S. Br. 43-44.

Respondents' approach would severely erode the principle of equal protection. It could, no doubt, have been "proved" by expert psychological or sociological testi-

mony in 1982, and found as a fact, that more women than men preferred to be nurses, or that women "tend to" be better suited for nursing because "most" women had more nurturing and tolerant personalities than "most" men. Similarly, sociological experts would no doubt have overwhelmingly agreed that, in 1979, most fathers did in fact bear the primary responsibilities as breadwinners, most mothers in fact were the center of home and family life, most biological mothers in fact had more intimate relationships with their children than did most biological fathers, and many persons were satisfied with those roles. But such testimony and findings would no more have rendered constitutional the restrictive sex-based policies at issue in *Hogan*, *Westcott*, and *Caban* than can the expert testimony and findings in this case that "most" women are not sufficiently confident and aggressive to withstand VMI's training sustain the categorical exclusion of women from VMI.

4. Respondents have completely failed to substantiate their vague assertions that VMI could not withstand the admission of women. Neither the lower courts nor respondents have ever explained exactly how women's admission to VMI would "destroy" it. The admission of women would change VMI, just as the admission of blacks following *Sweatt* changed the University of Texas Law School, but changes made necessary by including a previously excluded group cannot—simply because they are changes—be a constitutional justification for continued exclusion.

With respect to privacy, respondents make the exaggerated contention (Br. 44) that allowing men and women privacy from members of the other sex while using the bathroom and changing clothes would "separat[e] VMI's student body into two distinct gender groups, each continually asserting privacy rights as against the other." It is unclear how the fact that men may close a

bathroom door to women, or vice versa, defies the "leveling" process that VMI purports to foster. The notion that an institutional requirement of group nudity could be used to exclude women from a male institution they would otherwise have a constitutional right to attend is preposterous. See 94-1941 U.S. Br. 27-28.

With regard to physical training, respondents utterly ignore the findings that many women can succeed within the VMI methodology, and are capable of doing all of the individual activities that are now required of VMI cadets, including the military drills and physical training *in accordance with the current standard established for VMI's exclusively male student body*. Pet. App. 76a, 223a, 234a. Thus, even if any changes in physical training would "destroy" VMI's program (a conclusion we reject), the current physical requirements certainly do not justify excluding those women who can meet them. Nor has VMI shown any important interest that would be affected were it to make minor adjustments in its physical training standards, such as by having women do flex-arm hangs instead of pull-ups. See 94-1941 U.S. Br. 28-29; 94-2107 U.S. Br. 30.[12]

Respondents' most mystifying assertions pertain to their theory that VMI could not withstand the admission of women because it could not "accommodate" cross-sex confrontation and harassment. 94-2107 Br. 18-19; see 94-1941 Br. 45-46 & n.35. The presence of women would, however, not affect the ability of any cadet to "harass" or make demands of any other cadet, so long as the harassment was not sex-based.[13] A similar situation already exists at VMI with respect to the school's black cadets, who are protected from race-based "harassment." Presumably, the adversative system does not depend on harassment that is sex- or race-based.[14]

[12] The national military physical training standards allow women, based on physiological differences, to do flex-arm hangs rather than pull-ups. Pet. App. 235a. Those are the standards that VWIL women are held to, and respondents assert (Br. 9) that the VWIL program is of equal physical rigor to VMI's.

[13] Respondents' suggestion that any "harassing" pressures placed on a woman could be grounds for a hostile-environment claim is a misstatement of the law. See, *e.g.*, *Harris* v. *Forklift Systems, Inc.*, 114 S. Ct. 367 (1993); *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986). Women in many contexts, including education, endure tremendous stresses and "harassing" interpersonal interactions that are perfectly legal because not based on their sex.

5. Respondents argue (Br. 47-48) that the United States waived the argument that strict scrutiny should be applied to classifications that deny opportunities to individuals based on their sex. One waives claims, however, not legal arguments. This Court's "traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron* v. *National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995) (quoting *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992)).[15]

The United States' consistent claim in this case has been that VMI's men-only admissions policy, and the

[14] If VMI students traditionally employ sex-based epithets that would constitute sexual harassment when applied to women, however, such practices cannot justify excluding women, but would have to be abandoned. *Cf. Single Gender Education and the Constitution*, 40 Loy. L. Rev. 253, 270 (1994) (remarks of Sara L. Mandelbaum) (describing testimony of Citadel cadet Ronald Vergnolle that, at the Citadel, "the most common insult that was hurled at cadets who did not meet the required standard of masculinity was to call them * * * 'wom[e]n'").

[15] Contrary to respondents' contentions (Br. 47-48 & n.36), the United States did not affirmatively disavow strict scrutiny in the court of appeals. Moreover, respondents contended in the court of appeals that the United States "attempt[ed] to impose strict scrutiny by another name," 91-1690 VMI C.A. Br. ii, 35, and they opposed it, *id.* at 35-41; see also R. 152, at 111-113 (¶¶ 23-25) (respondents' argument in district court that strict scrutiny is not applicable).

VWIL remedy, violate the Equal Protection Clause. There is no question that the equal protection claim is preserved. Our argument about the level of scrutiny does not present a new claim, but rather addresses the standard under which the equal protection claim should be decided. We argued in the court of appeals, as we continue to assert here, that the invalidity of both VMI's exclusionary policy and the remedy the court of appeals adopted is clear even under intermediate scrutiny. The question whether strict scrutiny should apply here is "not a new claim within the meaning of that rule, but a new argument to support what has been [our] consistent claim." *Lebron*, 115 S. Ct. at 965.

* * * * *

For the reasons stated above and in our opening brief, the judgment of the court of appeals regarding remedy should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

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OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,
v.
COMMONWEALTH OF VIRGINIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICI CURIAE OF WELLS COLLEGE, SOUTHERN VIRGINIA COLLEGE AND SAINT MARY'S COLLEGE SUPPORTING AFFIRMANCE

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BRIEF *AMICI CURIAE* OF WELLS COLLEGE, SOUTHERN VIRGINIA COLLEGE AND SAINT MARY'S COLLEGE SUPPORTING AFFIRMANCE

INTEREST OF *AMICI CURIAE*

Wells College, founded in 1868, is a private women's college located in Aurora, New York. Saint Mary's College, founded in 1842, is a private women's college located in Raleigh, North Carolina. Southern Virginia College, a private college located in Buena Vista, Virginia, has been dedicated to educating women since its founding in 1867. For more than a century, these schools have provided high quality education for women. Throughout their history, they have become enthusiastic supporters of the pedagogical value of single-gender education. In-

deed, Wells, Saint Mary's and Southern Virginia College believe that they and other single-gender educational institutions provide needed diversity in American post-secondary education.

Because *amici* are committed to the education of women in a single-gender environment, *amici* urge this Court to protect the ability of these institutions to continue to offer single-gender education.*

SUMMARY OF ARGUMENT

Amici Wells, Saint Mary's and Southern Virginia College are all private liberal arts colleges for women. These single-gender institutions provide excellent education in the liberal arts and offer an environment conducive to producing female leaders. Indeed, the Fourth Circuit Court of Appeals in this case twice affirmed the District Court's findings that single-gender educational opportunities are valuable for both males and females. Said the Court in this case:

> Thus, while the data support a pedagogical justification for a single-sex education, they do not materially favor either sex. Both men and women appear to have benefited from single-sex education in a materially similar manner.

United States v. Commonwealth of Virginia, 976 F.2d 890, 897-98 (4th Cir. 1992) (VMI I); *see also United States v. Commonwealth of Virginia*, 44 F.3d 1229, 1239 (4th Cir. 1995) (VMI II) (reaffirming that single-gender education benefits both sexes). Similarly, in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), this Court also recognized the viability of single-gender education. *Id.* at 728, 732, n.17. This Court's decision in *Mississippi University for Women v. Hogan* and the

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* Petitioner/Cross-Respondent and Respondents/Cross-Petitioners consented to the filing of this brief. Copies of the consent letters have been filed with the Clerk.

District Court's findings in this case support the conclusion that there is a legitimate and important pedagogical justification for single-gender education.

Amici urge this Court to affirm that finding with respect to single-gender education and to construct a decision that will allow the continuation of single-gender education in the United States.

ARGUMENT

SINGLE-GENDER EDUCATION PROVIDES SUBSTANTIAL EDUCATIONAL BENEFIT TO WOMEN

As is amply demonstrated by the evidence considered by the District Court in this case, a large number of studies have confirmed the value and importance of single-gender education. *See, e.g.*, Marvin Bressler & Peter Wendell, *The Sex Composition of Selective Colleges and Gender Differences in Career Aspirations*, 51 J. Higher Educ. 650, 662 (1980), cited in the Circuit Court's opinion, *VMI I*, 976 F.2d at 897. Acknowledging the merit of these studies and the testimony supporting them, the District Court in this case found that men and women are treated differently in the classroom and women have more chances for leadership at single-sex institutions. *United States v. Commonwealth of Virginia*, 852 F.Supp. 471, 480 (W.D. Va. 1994). The District Court also found that the educational benefits flowing from a single-gender environment cannot be replicated in a coeducational setting. Thus, concluded the District Court, single-gender education adds an important measure of diversity in an overall educational system. *United States v. Commonwealth of Virginia*, 766 F. Supp. 1407, 1415 (W.D. Va. 1991).

The Circuit Court in this case expressly adopted the District Court's factual findings, concluding that single-gender education "yields concrete educational benefits." *VMI II*, 44 F.3d at 1239. In reaching its conclusion, the Circuit Court stated:

> This should not be surprising in light of common experience that a sex-neutral atmosphere can be less distracting to late adolescents in an educational setting where the focus is properly on matters other than relationships between the sexes.

VMI II, 44 F.3d at 1238.

Based on the factual record before it, the Fourth Circuit Court held:

> Just as a state's provision of publicly financed education to its citizens is a legitimate and important governmental objective, so too is a state's opting for single-gender education as one particular pedagogical technique among many.

VMI II, 44 F.3d at 1239.

In fact, several studies published since the Fourth Circuit Court's ruling confirm its conclusion that single-gender education offers significant advantages when compared to coeducation. *See, e.g.*, Mikyong Kim & Rodolfo Alvarez, *Women-Only Colleges: Some Unanticipated Consequences*, 66 J. Higher Educ. 641 (Nov./Dec. 1995); Daryl G. Smith, Lisa W. Wolf, and Diane E. Morrison, *Paths to Success: Factors Related to the Impact of Women's Colleges*, 66 J. Higher Educ. 245 (May/June 1995); *see also Growing Smart: What's Working for Girls in School*, Report Commissioned by the American Association of University Women Educational Foundation, Executive Summary and Action Guide, Oct. 1995. The popular press has echoed these conclusions, reporting that women's colleges produce successful leaders in the workplace. *See, e.g.*, "A Burst of Popularity," U.S. News & World Report, Sept. 26, 1994, at 105, cited in the Circuit Court's opinion, *VMI II*, 44 F.3d at 1238-39.

Despite the Circuit Court's conclusions in this case and this Court's holding in *Mississippi University for Women*, several commentators and *amici* supporting the government assert that public support of any kind of single-

gender education is unconstitutional. They urge this Court to adopt a strict scrutiny standard and measure every institution according to that standard. *See* Brief of *Amici Curiae* National Women's Law Center, et al., On Petition for Writ of Certiorari, *U.S. v. Virginia, cert. granted*, —— U.S. ——, 116 S.Ct. 281 (1995), p. 9. Single-gender education, they claim, can be supported only as remedial action on behalf of women, not because single-gender education is valuable standing by itself.

The implication is that even a private institution will be unable to offer single-gender education if it receives federal financial assistance, state aid, or merely a state or federal tax exemption. Indeed, since *Grove City College v. Bell*, 465 U.S. 555 (1984), and the resulting amendments to Title IX, the government has maintained consistently that federal jurisdiction over the entire institution is triggered if a private institution receives any public financial assistance, direct or indirect. Although the Second Circuit Court of Appeals (the Circuit in which Wells is located) twice reaffirmed that such government funding does not transform a private institution into a public one, *Albert v. Carovano*, 851 F.2d 561 (2d Cir. 1988); *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968); *accord Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), the government and its supporting *amici* seem to suggest that a private institution, by accepting public benefits or taxpayer largess, becomes subject to the same constitutional scrutiny as public institutions. Thus, they argue, traditionally private institutions will be unable to offer single-gender education.

Amici do not believe that this Court has made any such ruling. Already, however, lawsuits are emerging to test this argument and the viability of single-gender admissions policies at private institutions. A District Court in Georgia may soon be adjudicating the rights of a male applicant seeking admission to Spelman College, a private women's college in Atlanta, Georgia. The Chronicle of

Higher Education (Oct. 27, 1995, at A29) reports the male applicant asserts that because Spelman receives federal financial assistance, it cannot discriminate against men in its admissions policy without violating Title IX. Thus, the issue of how far this Court's ruling in this case will extend is already being raised. Similarly, the U.S. Education Department is reviewing a complaint filed recently against Converse College, a private women's college in South Carolina. Converse is the college where a program similar to the one at Mary Baldwin College (discussed in the record in this case) has been established. The complaint chailenges the College's receipt and use of state funds to create a new, single-gender leadership program for women, urging that this aid makes the institution a public one that is subject to Title IX's prohibition on discrimination in admissions.

Contrary to the arguments urged by the government and its supporters in this case, *amici* believe strongly that private women's colleges are protected by Title IX and the U.S. Constitution. Recognizing, however, that almost every private, single-gender institution could not survive without public funds, *amici* urge that this Court clear any remaining doubt. This Court's decision in ***Mississippi University for Women*** and the District Court's findings in this case support the holding that providing the option of a single-gender college education is a legitimate and important aspect of both a public and private system of higher education.

Against such a background, this Court cannot allow a misinterpretation of its holding in ***Mississippi University for Women***, *supra*. Instead, it should reaffirm the value of single-gender education, hold firmly and clearly that it has its place in the American higher education system, and rule that educationally successful institutions like *amici* may constitutionally offer single-gender education.

CONCLUSION

For the foregoing reasons, the Court should affirm the Fourth Circuit Court's decision upholding the constitutionality of the proposed single-gender remedial plan.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

COMMONWEALTH OF VIRGINIA, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AMICUS BRIEF OF NANCY MELLETTE IN SUPPORT OF PETITIONER UNITED STATES OF AMERICA

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INTEREST OF AMICUS NANCY ELIZABETH MELLETTE

Nancy Mellette is a South Carolina resident who has applied for admission to The Citadel, the Military College of South Carolina.[1] The Citadel is a public military-style college, set in a large campus in Charleston, South Carolina, which has excluded women since its founding in 1842. Ms. Mellette has long wished to join The Citadel's Corps of Cadets and is qualified in all respects for admission to the Corps, other than gender. She is now in her senior year of high school at Oak Ridge Miliary Academy, a military boarding school in Oak Ridge, North Carolina. She is a second lieutenant in her cadet cadre, ranks fourth in her class, and holds eleven letters in various sports. Ms. Mellette's father attended The Citadel; her brother is currently a senior at The Citadel.

The exclusionary policy of The Citadel was initially challenged by Shannon Faulkner. *Faulkner v. Jones*, 858 F. Supp. 552 (D.S.C. 1994) ("*Faulkner I*"). Ms. Faulkner pursued her claim and was ultimately admitted to The Citadel as a cadet in August 1995. *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995) ("*Faulkner II*"). After Ms. Faulkner withdrew, Ms. Mellette successfully moved to intervene in the *Faulkner* action, which she is continuing to prosecute.

The decisions of the Fourth Circuit relating to the Virginia Military Institute ("VMI"), *United States v. Commonwealth of Virginia*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993) ("*VMI I*") and *United States v. Commonwealth of Virginia*, 44 F.3d 1229 (4th Cir. 1995) ("*VMI II*"), have provided controlling authority in the *Faulkner* litigation against The Citadel. Ms. Mellette consequently has a very substantial interest in the outcome of this Court's review of *VMI*.

---

[1] The parties' written consent to the filing of this brief has been filed with the Court.

The Importance of The Citadel in South Carolina

The Citadel is the only public institution of higher education in South Carolina that offers a military-style education; it is also the only public institution that is sex-segregated. *Faulkner I*, 858 F. Supp. at 556. As the president of The Citadel has testified, The Citadel, which currently has approximately 1600 cadets, offers a regimented military structure and "no other institution in South Carolina offers an equivalent experience." Supplement to Joint Appendix filed in the *Faulkner* litigation in the Fourth Circuit ("JA Supp."), Exh. K at 92-97; 99-100.

Since its founding more than 150 years ago, The Citadel has played a central role in the history of South Carolina. For example, The Citadel's alumni include a sitting United States senator, multiple former governors of South Carolina, a United States ambassador, two sitting federal court judges, a sitting justice on the South Carolina Supreme Court, and the current president of the University of South Carolina, as well as numerous state legislators, prominent business leaders and senior military officers.

Like VMI, The Citadel offers its male students the invaluable benefits of its prestige, access to a powerful and influential alumni network, a rich endowment and other resources that are unparalleled in South Carolina. *See Faulkner II*, 51 F.3d at 450-51 (Hall, J. concurring). The accomplishments and prestige of The Citadel's alumni make it attractive to women as well as to men.

The Citadel admits that women could perform just as well as its male cadets and would benefit tremendously from its rigorous military-style program. Joint Appendix filed in the *Faulkner* litigation in the Fourth Circuit ("JA"), JA 237-238; JA 739. Unlike VMI, The Citadel's witnesses concede that The Citadel would still be able to fulfill its mission if women were admitted. JA 730-731.

Since the commencement of this lawsuit, Citadel alumni in positions of power in South Carolina have waged an aggressive campaign to preserve The Citadel as an all-male institution. Following the denial of VMI's petition for certiorari in *United States v. Commonwealth of Virginia*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993), several influential alumni met with representatives of The Citadel and its counsel to organize an effort to persuade the South Carolina general assembly to concoct a resolution to support The Citadel's discriminatory admissions policy. A prominent Citadel alumnus drafted a concurrent resolution, which has no force of law, that closely tracked the arguments made by counsel for The Citadel. Five Citadel alumni in the General Assembly sponsored the resolution.

Pursuant to the resolution, a legislative committee was formed for the ostensible purpose of reviewing existing opportunities for single-sex education for women in South Carolina, and making recommendations to the General Assembly. The Speaker of the House appointed a former member of The Citadel's governing board; six of its ten members also were graduates of The Citadel. Not surprisingly, the committee endorsed The Citadel remaining all-male and suggested that South Carolina consider providing opportunities for single-sex education for women. Neither the General Assembly, nor any state official, voluntarily has made any effort to address the absence of equal opportunities for women in South Carolina.

To the contrary, South Carolina repeatedly refused to comply with court orders to file a specific remedial proposal. In February, 1994, the South Carolina district court ordered that defendants file a remedial proposal by April 1, 1994. The district court ordered a hearing on the unresolved factual issues in the case. Given the Fourth Circuit's decision in *VMI I*, the district court limited the issues to be tried to (1) whether defendants could articulate any fact or argument that distinguished this case from the decision in *VMI I*; and (2) if liability were found, the appropriate remedy for the violation of the rights of Ms. Faulkner and other similarly situated women. The Citadel defendants unsuccessfully sought to postpone filing a remedial plan until *after* a trial on liability. After the district court denied their request, South Carolina filed a proposal unilaterally declaring that it would submit a remedial plan 60 days after a finding of liability.

The District Court Decision in the Citadel Case

Following a two-week hearing on liability and remedy, the District Court issued its opinion on July 22, 1994 holding that The Citadel's males-only admission policy violates the right of Ms. Faulkner and other women to equal protection under the law as guaranteed by the Fourteenth Amendment. *Faulkner I*, 858 F. Supp. at 566. The district court found that South Carolina had refused to propose or develop any remedial plan, as it required, and ordered the immediate admission of Ms. Faulkner into the Corps of Cadets.

In its decision, the district court found that "[t]he unique feature of The Citadel is the requirement that all undergraduate day students be members of the South Carolina Corps of Cadets, subject to military discipline at all times, and enrolled in programs of study which qualify graduates for commissions in the active or reserve armed forces." *Id.* It further found that "[t]he type of education available at The Citadel is not available at any other institution in South Carolina." *Id.*

The district court expressly rejected defendants' argument that the exclusion of women from The Citadel was justified by a state policy favoring single-sex education, where sufficient demand existed, as part of a diverse educational system. Despite the defendants' request, the District Court made no finding that South Carolina had a policy of providing single-sex education; instead, the district court found that all of the formerly single-sex public colleges in the state had become coeducational, except for The Citadel. The district court refused to admit the legislative committee report into evidence, finding that it lacked trustworthiness because of the control of Citadel alumni over the committee and its report. Trial Transcript dated 5/27/94 at 63-64.

Turning to remedy, the District Court found that the only available remedy to redress the violation of Ms. Faulkner's rights was to order her immediate admission into the Corps of Cadets program. *Faulkner I*, 858 F. Supp. at 568. The district court found that defendants refused to propose or develop any remedial plan while still doing their utmost to keep

Ms. Faulkner out of The Citadel. The district court found that "no effort has been made to determine the feasibility of any specific remedy" or even contact the state legislature about the plan. *Id.* The district court further found that "[n]ot once has a defendant done anything to indicate that it is sincerely concerned to any extent whatsoever about Faulkner's constitutional rights." *Id.* at 567. It concluded that:

> [A]ll of the actions witnessed by this court clearly and unequivocally indicate that the defendants would exert all of their considerable influence to insure that Faulkner would never have the opportunity to enroll in such a parallel institution or program.

Id. at 568.

The district court ordered defendants to (i) immediately admit Ms. Faulkner, and (ii) admit all other qualified women for the 1995-96 school year unless defendants filed a remedial plan to address the violation of their rights, and implement such a proposal by August 1995.

Significantly, the district court did not permit the parties to present any evidence on the purported benefits of single-sex education or the effect of the admission of women into The Citadel. Ms. Faulkner and the District Court accepted the findings and conclusions of *VMI I* as binding *solely* for the purposes of determining unresolved factual issues raised by Ms. Faulkner's motion for summary judgment. The district court specifically reserved Ms. Faulkner's right to challenge at a future trial the alleged value of single-sex education, the asserted pedagogical value of The Citadel, or any other issue that distinguishes The Citadel from VMI. *Faulkner I*, 858 F. Supp. at 555 n.5.

The Court of Appeals granted defendants' application for a stay in a 2-1 decision, without opinion. Order of the United States Court of Appeals for the Fourth Circuit dated August 12, 1994. Judge Hall filed a dissenting opinion. *Id.*

On October 4, 1994, South Carolina filed yet another "plan to plan" for a remedial proposal which did not specify any particular program or even select a host institution. The district court advised defendants that their so-called "plan" was incapable of review.

The Court of Appeals' Decision in the Citadel Case

On April 13, 1995, the Fourth Circuit affirmed the liability determination of the district court, but modified the remedial order. *Faulkner II*, 51 F.3d 440 (4th Cir. 1995) It held that The Citadel's males-only admission policy violates the right of Ms. Faulkner and other qualified young women to equal protection in that South Carolina provides men with a unique and valuable military-style education at The Citadel, but denies women any comparable opportunity. *Faulkner II*, 51 F.3d at 451 (Hall, J. concurring). The Court of Appeals ruled that defendants failed to offer any remedy for the violation of Ms. Faulkner's rights and that their actions "clearly and unequivocally" indicated that they would use "all of their considerable influence" to ensure that Ms. Faulkner was excluded from any remedial plan. *Id.* at 446-47. It held that defendants had been on notice since 1992, when the Fourth Circuit held VMI's males-only admission policy unconstitutional, that South Carolina must adopt a remedy. *Id.* at 447.

While the Court of Appeals recognized that many women could perform as well as men at VMI and The Citadel, it modified the district court order to permit South Carolina yet another opportunity to propose a separate program for women before August 1995. It also held that, under *VMI II*, South Carolina could remedy the equal protection violation by creating a separate, non-military program for women that differs "in form and detail" from The Citadel's Corps of Cadets program. *Id.* at 443.

In a concurring opinion, Judge Hall stated his view that the only remedy possible was the integration of women into The Citadel. Judge Hall disagreed with the principles in *VMI I* and *VMI II*, saying that while he was bound to respect the precedents of the Fourth Circuit, "I am convinced that we have

embarked on a path that will inevitably fall short of providing women their deserved equal access to important avenues of power and responsibility." *Faulkner II*, 51 F.3d at 450 (Hall, J. concurring). He concluded that, under *Brown v. Board of Education*, 347 U.S. 483 (1954) ("*Brown I*"), "the opportunity of an education[,] . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms . . . . Separate educational facilities are inherently unequal." *Id.* at 451.

In his *Faulkner* concurrence, Judge Hall wrote that the Fourth Circuit decisions in *VMI* "promoted a means to an end — single gender education — to the status of an end in itself and avoided ascertaining, let alone analyzing, the true purpose behind the state's decision to keep women out of VMI." *Id.* He rejected Judge Niemeyer's assumption that *Faulkner* and *VMI* are about single-gender education, concluding instead that they "have very much to do with wealth, power, and the ability of those who have it now to determine who will have it later." *Id.* He explained:

> The daughters of Virginia and South Carolina have every right to insist that their tax dollars no longer be spent to support what amount to fraternal organizations whose initiates emerge as full-fledged members of an all-male aristocracy . . . . As we prepare, together, to face the twenty-first century, we simply cannot afford to preserve a relic of the nineteenth.

Id.

South Carolina's Defective Remedial Proposal

Prompted by the pending admission of Ms. Faulkner into the Corps of Cadets, as a result of the Fourth Circuit decision, Citadel alumni donated $5 million from the Citadel Development Foundation to entice Converse College, a private women's college, to agree to provide a non-military "parallel" program for women. South Carolina's Proposed Reme-

dial Plan dated 6/5/95 at 8-9. In addition, Citadel alumni who were members of the South Carolina General Assembly sponsored an amendment to the state budget bill allocating $1.4 million to fund initial capital and operating costs for the Converse program. Journal of the Senate of the State of South Carolina dated 5/4/95. The Citadel's full-time lobbyist, a state employee, worked with the alumni to insure passage of the legislation. Legare deposition transcript dated 10/4/95 at 23. To circumvent a state statute that only permits a public college to employ one lobbyist, The Citadel arranged for the Association of Citadel Men, another alumni organization, to hire three additional lobbyists to ensure the adoption of the legislation. *Id.* at 102.

Under South Carolina law, the supplemental appropriation of funds for the Converse plan required approval of the Commission of Higher Education. S.C. Code Ann. §59-103-35. The General Assembly approved the legislation, which was part of the state budget bill, before specific requirements or substance of the Converse plan were even developed. During a ten-hour floor debate, Glenn McConnell, a Charleston state senator, warned that a vote against funding the Converse plan "would spell the death of The Citadel as we know it." Transcript of district court 7/19/95 hearing at 115. Under the legislation, South Carolina is not obligated to fund any portion of the Converse program unless and until the Fourth Circuit approves the remedial proposal. Agreement between the State of South Carolina and Converse College, exhibit 3 to South Carolina's Proposed Remedial Plan at 3-4.

Rather than reflecting a genuine commitment to expanding educational opportunities for women, the legislation specifically provides that the expression of a state "policy" for single-sex education is null and void if the Supreme Court issues an order admitting women into VMI. Journal of the Senate of the State of South Carolina dated 5/4/95. In addition, the continued operation of the Converse program is dependent upon The Citadel contributing an additional $3 million to Converse to cover its necessary expenses during the first four years of the program's operation. Agreement between Converse College and The Citadel, exhibit 12 to South Carolina's Proposed Remedial Plan at 3-4. Of the total $11.4 million required to operate the program, The Citadel and its alumni will fund $8 million.

The Citadel defendants contend that the Fourth Circuit in *VMI I* and *VMI II* held as a matter of law that single-sex education is valuable and that the admission of women to The Citadel would materially change its program. They have filed numerous motions to limit the issues at trial to (1) whether the program has the same mission and goals as The Citadel; and (2) whether it is intended to achieve the same outcomes as The Citadel. The district court has scheduled a trial commencing on December 4, 1995 to review South Carolina's remedial plan.

SUMMARY OF ARGUMENT

The decision below reinvokes the wholesale exclusion of an entire class of persons from unique and prestigious public institutions of higher education that has not been countenanced by this Court since *Plessy v. Ferguson*, 163 U.S. 537 (1896), when separate educational facilities for African-Americans were lawful. In *VMI I*, the Fourth Circuit held that VMI's males-only admission policy was not substantially related to an important governmental interest. While the Fourth Circuit found that "some women would qualify for and benefit from" VMI, it nevertheless refused to require their admission "in light of the generally recognized benefits that VMI offers men and the changes that would occur if women were admitted." *VMI I*, 976 F.2d at 846, 900. In *VMI II*, the Fourth Circuit authorized Virginia to remedy the discriminatory exclusion of women from VMI's rigorous military-style program by creating a brand-new program for women at Mary Baldwin College (the "VWIL" program), which the district court found failed the "separate but equal" test in *Plessy*. While the Fourth Circuit conceded that the Mary Baldwin program "lacked the prestige and benefits of a degree from VMI," it ruled that VWIL seeks to teach women leadership and therefore is "suf-

ficiently comparable" to justify the preservation of VMI as an all-male college. *VMI II*, 44 F.3d at 1241.

Given the widespread integration of women into the military, the notion that women would "destroy" VMI is based neither on fact nor reasoning, but on prejudicial beliefs about the proper role and interests of women that are "relic[s] of the nineteenth [century]." *Faulkner II*, 51 F.3d at 451 (Hall, J. concurring). In authorizing a segregated and manifestly inferior program for women, the Fourth Circuit relied upon stereotypical and overly broad generalizations about "differences" in the "educational needs" of "most" women and men reminiscent of those used to justify racial segregation. In *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2112 (1995), this Court reaffirmed "the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups." *VMI II* violates this fundamental principle, denying qualified women like Nancy Mellette a military-style college solely because of their membership in a group which, like African-Americans, historically has been denied access to important avenues of power and opportunity.

Moreover, the holding in *VMI II* that colleges can reach similar results with different methods necessarily precludes a finding that the exclusion of women from VMI is substantially related to an important governmental objective. If the Fourth Circuit is correct, then The Citadel and VMI can achieve similar outcomes even if the admission of women required certain accommodations in their educational method. On the other hand, if the adversative method is essential to the nature of The Citadel or VMI, then a non-adversative program for women cannot be either equal or comparable. The Fourth Circuit in effect uses a double standard in measuring equal protection: men are entitled to a unique educational methodology offered by The Citadel, unsullied by the presence of women, but women are merely entitled to "comparable outcomes."

This case is not about Virginia's failure to provide women with "single-sex education," nor is it about a classification based upon "homogeneity of gender," as suggested in *VMI II*.

VMI II, 44 F.3d at 1233. It is about the historical exclusion of women from a unique and prestigious state military college. It is about the influence and political clout of VMI (and Citadel) alumni, who together have contributed nearly $15 million to preserve their alma mater "from the unwelcome intrusion of women." *See United States v. Commonwealth of Virginia*, 52 F.3d 90, 92 n.3 (Motz, J. dissenting from denial of rehearing en banc). It is about "wealth, power, and the ability of those who have it now to determine who will have it later." *Faulkner II*, 51 F.3d at 451 (Hall, J. concurring).[2] Women like Nancy Mellette who are qualified for the rigors of the military program at VMI are entitled not merely to a "comparable education" at another college, but to "equal access to important avenues of power and responsibility" that VMI offers its male graduates and alumni. *Id.*

I

THE HISTORICAL EXCLUSION OF QUALIFIED WOMEN FROM A PRESTIGIOUS PUBLIC PROGRAM OF HIGHER EDUCATION, SOLELY ON THE BASIS OF THEIR SEX, VIOLATES EQUAL PROTECTION

A. VMI and The Citadel Are Prestigious Military-Style Colleges That Offer Male Graduates Unique and Intangible Benefits

VMI is a military college with a "distinctive educational method" that is "unique in all the world." *United States v. Commonwealth of Virginia*, 766 F. Supp. 1407, 1415 (1991). It offers an "intensity of the barracks-centered lifestyle that makes VMI so attractive to many applicants, and so important to its graduates." *Id.* at 1414. Since its founding, VMI

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[2] Nor is this a case about compensatory educational programs for historically disadvantaged groups. Virginia does not assert that the sex-segregated programs proposed in this case or The Citadel case are an affirmative attempt to rectify historical discrimination against women.

has occupied a prominent place in the military history of Virginia. In the first sentence of the district court opinion finding VMI's males-only policy constitutional, Judge Kiser described the historical role of VMI cadets in the Civil War when they confronted the United States in May of 1864. *Id.* at 1408.

Today, VMI remains a prestigious institution which offers its alumni access to a wealth of political and socioeconomic opportunities. A VMI education does not merely train men to become "citizen-soldiers," it bestows a prestigious degree that serves as an entree into an alumni network with "powerful political and economic ties." *VMI II*, 44 F.3d at 1250. Even the majority panel in *VMI II* conceded that VMI offers its graduates the invaluable benefits of its prestige and reputation. *Id.* at 1241.

VMI was not founded as a "single-sex" institution, but as a military college for men only. Since its founding in 1839, VMI admitted only men, not because of any "pedagogical" belief in "single-sex" education, but because women were excluded from the military. As Judge Phillips points out:

> When Virginia Military Institute was founded in 1839 as a state-supported military school for men only, it is inconceivable that any thought was given by the founders to the possibility that women should not be denied its intended benefits. No conscious governmental choice between alternatives therefore dictated the original men-only policy; it simply reflected the unquestioned general understanding of the time about the distinctively different roles in society of men and women.

44 F.2d at 1243 (Phillips, J. dissenting). "Single-gender education" is not an educational method at VMI, "it is, at best, a stratagem to achieve the Commonwealth's real objective - preservation of VMI . . . from the unwelcome intrusion of women." *VMI*, 52 F.3d 90, 92 (4th Cir. 1995) (Motz, J. dissenting).

While The Citadel employs a different methodology than VMI in its military program, it similarly occupies a unique

place in the history and tradition of South Carolina. According to the South Carolina Commission on Higher Education, a "unique feature" of The Citadel is "the requirement that all undergraduate day students be members of the South Carolina Corps of Cadets, subject to military discipline at all times, and enrolled in programs of study which qualify graduates for commissions in the active or reserve armed forces." *Faulkner I*, 858 F. Supp. at 556 (citing Commission for Higher Education Master Plan). The Citadel was founded in 1842 as the military college of South Carolina.

Because The Citadel is designated as a military college, the legislature "deemed it appropriate" to exclude women. *Williams v. McNair*, 316 F. Supp. 134, 136 (D.S.C., 1970), *aff'd by divided court without written opinion*, 401 U.S. 951 (1971). Prior to litigation against The Citadel, there was no document or written policy of South Carolina discussing the supposed benefits of "single-gender education." The claim now made by South Carolina that it has a "policy" of supporting "single-gender" education is entirely a contrived post-litigation rationalization. In fact, the defendants in the Citadel litigation have conceded that, prior to the commencement of litigation, no study of the alleged value of "single-gender education" had ever been done by South Carolina or The Citadel.

B. *The Exclusion of Qualified Women from a Public Program of Higher Education is Not Substantially Related to an Important Governmental Objective*

In *Brown I*, 347 U.S. 483 (1954), this Court recognized that "education is perhaps the most important function of state and local governments." This Court held that "the opportunity of an education[,] . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Id.* at 488; *see also United States v. Fordice*, 505 U.S. 717 (1992). This Court repeatedly has held that the opportunity for a public education is not limited to the tangible components of a program, such as the physical facilities or course offerings. Educational opportunity includes access to those qualities "that make for greatness in a . . .

school," including the ability to develop working relationships with one's peers. *Sweatt v. Painter*, 339 U.S. 629, 634 (1954).

Under intermediate scrutiny, this Court has never upheld a state classification that perpetuates the historical exclusion of women from public higher education. This Court repeatedly has recognized that women have suffered a "long and unfortunate history of sex discrimination," including in public education, where they still face "pervasive" discrimination. *See J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1425 (1994) (citing *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973); *see also Mathews v. Lucas*, 427 U.S. 495 (1976) (historic legal and political discrimination based upon sex, like discrimination based on race, has been severe and pervasive). The decision to deny qualified students access to public education solely on the basis of their sex is unlawful absent "an exceedingly persuasive justification." *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). This Court consistently has rejected sex-based classifications that have disadvantaged women, and only occasionally upheld classifications which serve women with a "benign and compensatory purpose." *See, e.g., Califano v. Webster*, 430 U.S. 313 (1977); *Schlesinger v. Ballard*, 421 U.S. 906 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974).

In *Hogan*, this Court struck down the female-only admission policy of the Nursing School of Mississippi University for Women ("MUW"), even though Mississippi offered men a comparable nursing program less than thirty miles away. While the dissent in *Hogan* wrote that offering the choice of single-sex education for women was valuable, this Court required Mississippi to prove that its discriminatory classification "is substantially related to an important governmental objective." *Hogan*, 458 U.S. at 721-722. This Court rejected Mississippi's argument that MUW's single-sex program compensated women for past discrimination in education. This Court held that women were overrepresented in nursing, and that MUW's female-only admission policy reinforced traditional stereotypes of the proper roles of men and women.

There is no principled reason that the same result should not obtain here. While a state might justify a program for women that was narrowly tailored to compensate women for past discrimination, the historical exclusion of women from the prestige and opportunities offered men at VMI plainly does not serve any compensatory purpose.

1. The Wholesale Exclusion of Women From VMI is Based On Stereotypical and Impermissible Generalizations

The decision below is based upon generalizations and stereotypes expressly prohibited by this Court in *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), *Hogan*, and other cases. Even if there is some statistical support for the argument that some women (and men) might benefit from a non-military program, a state may not exclude qualified women from VMI based simply upon a finding that most women (and men) are physically or psychologically unfit to participate in a military-style program. *See J.E.B.*, 114 S. Ct. at 1427 n.11. And even if there is a "measure of truth" in some of the stereotypes used to justify gender classifications, they cannot justify the refusal to admit women to VMI or The Citadel. To deny Nancy Mellette and other women admission to a public college for which they are indisputably qualified, solely because of their gender, perverts the fundamental principle of equal opportunity upon which this Nation rests. *See Adarand*, 115 S.Ct. at 2112.

2. The Assertion that the Admission of Women Will "Change" VMI Is Not Constitutionally Sufficient to Deny Women a Military-Style Education

VMI argues that the admission of women would materially change certain aspects of its program, making it more like the federal service academies. The lower courts agreed, finding that "[e]ven if the female could physically and psychologically undergo the rigors of the life of a male cadet, her introduction into the process would change it." *United States v. Commonwealth of Virginia*, 766 F. Supp. at 1414. The lower courts did *not* find that the changes would nega-

tively affect the ability of male cadets (or female cadets) to learn to become citizen-soldiers. Rather, they advanced the novel, and unsupported, theory that the prospect of *any* change in VMI's program, no matter how trivial, justified maintaining the purity of its admissions policy. *See, e.g., VMI II*, 44 F. 3d at 1440 ("the program would be irrevocably altered, forever denying its unique methodology to both men and women").

The district court found, for example, that "if VMI were to admit women, it would become more similar to the Virginia Polytechnical Institute, so that its uniqueness would be lost." The district court conceded that a coeducated VMI would still be unique, because "[e]ven if this were to occur, VMI would remain the only small college campus in Virginia offering a military program" and that women "would benefit from the availability of VMI." *United States v. Commonwealth of Virginia*, 766 F. Supp. at 1414. Despite that admission, the district court concluded, without any evidence, that the potential benefits to women were outweighed by the resulting changes in VMI's "process." *See id.* It concluded:

> VMI is a different type of institution. It has set its eye on the goal of citizen-soldier and never veered from the path it has chosen to meet that goal. VMI truly marches to the beat of a different drummer, and I will permit it to continue to do so.

Id. at 1415.

If the lower courts are correct that a public institution may exclude qualified applicants that may affect any aspect of its program, this nation's schools would be segregated to this day. The specter of "change" is constitutionally insufficient to deny qualified applicants admission to a public college. Moreover, it is logically inconsistent with the finding in *VMI II* that a college can achieve the same mission or goals under a variety of educational methods. If that is the case, Virginia cannot exclude women simply because VMI may have to put shades

on cadets's windows or locks on doors. The notion that women will "destroy" an institution ignores the reality that all of the federal service academies have admitted women for the past twenty years. This fear of women, which one Citadel expert likened to a "toxic virus," is neither a legitimate, nor important, state objective.

3. Virginia Cannot Deny Women a Unique Military-Style Education Under a Supposed Policy of "Diversity" or "Single-Sex Education"

Virginia's post hoc rationalization that VMI is a "single gender" college is not a true state policy, but an attempt to preserve its all male tradition. The Fourth Circuit found that VMI failed to offer any evidence of the existence of a policy of supporting single-sex education. *VMI I*, 976 F.2d at 898. To the contrary, the Fourth Circuit noted that the only official statement on the issue announced a policy of equal access and educational opportunities for both men and women. *Id.* The existence of such a policy is not consistent with the trend in Virginia toward coeducation. Each of the formerly public single-sex colleges in Virginia became coeducational, with the exception of VMI. The same is true of South Carolina. *See infra* at p. 4.

Even assuming that Virginia in fact had a policy of offering diversity or promoting single-sex education, it would not justify offering men, and not women, the benefits of a military-style education at VMI. A gender classification must do more than benefit members of the favored gender. *Hogan*, 458 U.S. at 731 n.17. As this Court explained, "since any gender-based classification provides one class a benefit or choice not available to the other class, . . . [the] argument begs the question." *Hogan*, 458 U.S. at 731 n. 17. Similarly, "[a] policy of diversity is not advanced by the establishment of an institution for only one gender." *Faulkner*, 10 F.3d at 232; *VMI*, 976 F.2d at 892.

II

VIRGINIA'S DECISION TO CONTINUE THE EXCLUSION OF WOMEN FROM VMI AND SEGREGATING WOMEN IN A SEPARATE AND INTENTIONALLY UNEQUAL PROGRAM COMPOUNDS THE ORIGINAL VIOLATION

A. *The Decisions Below Rest Upon Outmoded Stereotypes and Generalizations About Women That This Court Repeatedly has Rejected*

Rather than remedy the invidious exclusion of women from *VMI* (and The Citadel), *VMI II* compounds the violation by institutionalizing stereotypical and overly broad generalizations about men and women. In approving Virginia's remedial plan of sex-segregation, the Court of Appeals held that there are "acknowledged differences" in the educational "needs" of men and women that render women unsuitable for the rigors and stress of the VMI program. The Court of Appeals also based its exclusion of women on its observation that:

> If we were to place men and women into the adversative relationship inherent in the VMI program, we would destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes.

VMI II, 44 F.3d at 1239.

By branding all women as inappropriate or unfit for the ~~rigors or~~ stress of VMI and The Citadel, the decision below perpetuates prejudices and stereotypes that historically have been used to deny women equal access to employment, education, and the military. Just as this Court found that the Mississippi University for Women's "policy [of excluding males from admission to the School of Nursing] tends to perpetuate the stereotyped view of nursing, as an exclusively

woman's job," *Hogan*, 458 U.S. at 718, so does the exclusion of women from VMI perpetuate the stereotyped view of the military as exclusively a man's job. Segregating women into a separate program which Virginia lawmakers consider "more appropriate" for women robs young women of the choice to pursue a challenging military education. It is for women "to decide in which direction [their] advantage lies," *McKissick v. Carmichael*, 187 F.2d 949, 954 (4th Cir. 1951), *cert. denied*, 341 U.S. 951 (1951).

This genteel notion of a "sense of decency" between the sexes is reminiscent of chivalric, paternalistic rationales for treating women as less than equals. It is a modern day equivalent of the protectionist rationales used, for example, to limit women's employment opportunities (*see Muller v. Oregon*, 208 U.S. 412, 421 (1908) (women who work long hours on their feet suffer "injurious effects, upon the body, and, as healthy mothers are essential to vigorous offspring, their physical well-being becomes an object of public interest and care"); and to exclude women from juries *(see, e.g., Mississippi v. Hall*, 187 So. 2d 861, 863 (Miss. 1966), *appeal dismissed*, 385 U.S. 98 (1966) (women may be excluded from juries in part "to protect them . . . from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial")).

B. *The Fourth Circuit Failed to Subject Virginia's Asserted Objective to Heightened Scrutiny as Required Under Hogan*

In abandoning the well-established analysis employed by this Court in *Hogan*, the Fourth Circuit contrived its own "special intermediate scrutiny test" which effectively substitutes review under the rational basis test in place of the heightened scrutiny required by this Court. *See VMI II*, 44 F.3d at 1237. The "special" test eliminates the requirement in *Hogan* that a state demonstrate that its asserted governmental objective is sufficiently important to exclude an entire gender from a public college. Instead, the Fourth Circuit held that federal courts should "defer" to a state's recitation of the governmental ob-

jective served by a discriminatory sex-based classification, so long as the purpose "is not pernicious and does not violate traditional notions of the role of government." *VMI II*, 44 F.3d at 1237. The Court of Appeals conceded that "[t]he cautious approach to this first prong of intermediate scrutiny effectively redirects the court's focus on evaluating the state's means for obtaining its objective, which is the second step to the *Hogan* analysis." *Id.* at 1236.

This "deferential" treatment of a state's proffered justification insulates from scrutiny the very kinds of state declarations of purpose that courts are required to scrutinize, a dangerous throwback to the pre-*Reed* v. *Reed*[3] era, when gender classifications were presumed valid. The Court of Appeals failed to inquire whether Virginia's asserted objective in offering single-gender education in fact was the actual purpose of Virginia's remedial proposal, rather than its self-evident desire to perpetuate the all-male tradition of the school. This omission is particularly egregious because, as Judge Phillips points out, the proposal is a "judicially required remedy" for a discriminatory and invidious gender classification. *VMI II*, 44 F.3d at 1248.

Until this litigation, Virginia never sought to provide women with "single-sex" educational opportunities. It has not done so today. Without the millions of dollars donated by alumni committed to preserving VMI's all-male tradition, there would be no state-sponsored parallel program for women.

Taking judicial notice of matters commonly known in Virginia, Judge Phillips concluded that

> the prestige and influence of VMI and its justly loyal alumni and their organization in influencing any political decision affecting VMI's interest is sufficiently powerful to ensure that their overriding purpose in this matter effectively defines the actual governmental objective of the . . . proposed remedial plan. That overriding purpose remains the preservation of VMI as a state-supported educational institution for men only, with all other asserted purposes of the plan merely secondary means to that end.

[3] Reed v. Reed, 404 U.S. 71 (1971).

Id. at 1247 n. 5.

The governmental objectives proffered by Virginia to support the continued exclusion of women from VMI "demonstrably are rationalizations compelled by the exigencies of this litigation rather than the actual overriding purpose of the proposed separate-but-equal arrangement." *VMI II*, 44 F.3d at 1247. As Judge Phillips concluded

> the primary, overriding purpose is not to create a new type of educational opportunity for women, nor to broaden the Commonwealth's educational base for producing a special kind of citizen-soldier leadership, nor to further diversify the Commonwealth's higher education system . . . but is simply by this means to allow VMI to continue to exclude women in order to preserve its historic character and mission as that is perceived and has been primarily defined in this litigation by VMI and directly affiliated parties.

Id.

In addition, the Fourth Circuit failed to find that offering "single-sex" education is sufficiently legitimate and important to justify the permanent exclusion of women from a prestigious public college. Unlike the rational basis test, heightened scrutiny requires that a state demonstrate that its proffered objective is sufficiently important to justify preferential treatment of one gender. Most recently, this Court in *J.E.B.* held that even the right to an impartial jury was not a

sufficiently important interest to justify gender-based peremptory challenges. *See also Hogan*, 458 U.S. 718 (1982); *Frontiero*, 411 U.S. 677 (1974) (administrative convenience did not justify classification that awarded servicemen, and not women, spousal benefits without showing of dependency).

In light of *J.E.B*, the possibility that single-sex education may benefit some students is plainly insufficient to justify excluding women from VMI because of the supposed "educational needs" of "most" women. Not only is the purported interest in providing a particular type of education far less compelling than the constitutionally protected right to a fair trial, the Fourth Circuit acknowledged that there is disagreement among professionals over the supposed value of single-sex colleges. *VMI II*, 44 F.3d at 1230. In fact, there is no credible evidence that single-sex education for men is more beneficial than coeducation. For example, the Fourth Circuit in *VMI I* relied on findings by Alexander Astin, who did *not* testify at the trial, in his 1977 book, *Four Critical Years*, as to the value of single-sex education. *VMI I*, 976 F.2d at 897. Dr. Astin has now testified on behalf of the United States and Ms. Faulkner in *VMI* and *Faulkner*. His more recent research demonstrates that the single-sex admission policies of the colleges he studied in the late 1960s (when women were barred from Ivy League colleges) did *not* cause the effects he observed in his first study: the positive benefits remained *even after the schools became coeducational*.[4]

[4] The Fourth Circuit also relied upon Carol Gilligan's book, *In a Different Voice*, in discussing the finding of the district court. Like Dr. Astin, Dr. Gilligan did not testify at trial in VMI, but has appeared as a witness on behalf of Ms. Faulkner to testify that males-only colleges like The Citadel are harmful to men. She has filed an amicus brief on behalf of the United States in this proceeding.

C. *Virginia Cannot Remedy the Invidious Exclusion of Women from VMI by Creating a Separate and Intentionally Unequal Program That Lacks the Prestige, Tradition, or Reputation Offered at VMI*

Virginia cannot justify excluding women from VMI by claiming that it offers a "substantively comparable" education at another college. This Court in *Hogan* held that the exclusion of men from Mississippi University for Women's all-female nursing program was unconstitutional even though Mississippi offered men comparable nursing programs nearby. *Hogan*, 458 U.S. at 718. The classification under attack is the males-only admission policy of VMI. Whether or not Virginia offers women opportunities for a college education elsewhere is just as irrelevant as whether the male plaintiff in *Hogan* could attend another public nursing program.[5]

Even under the "separate but equal" rule of *Plessy v. Ferguson*, "a basic prerequisite was that [the separate programs] be truly, *substantially* equal in all the relevant criteria, tangible and intangible, by which educational institutions are evaluated." *VMI II*, 44 F.3d at 1249 (Phillips, J., dissenting). This Court repeatedly held that a separate and newly created educational program cannot duplicate the prestige, history or access to powerful alumni or professional networks of a well-established school. *Sweatt v. Painter*, 339 U.S. 629 (1954); *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950). The principles of equal protection announced in *Sweatt* and *McLaurin* apply equally to segregation based on sex. *See VMI*, 52 F.3d at 93 (Motz, J. dissenting); *Faulkner II*, 51 F.3d at 450 (Hall, J. concurring); *VMI II*, 44 F.3d at 1249 (Phillips, J. dissenting).

As the Virginia district court held in *VMI*, "if separate but equal is the standard by which the [remedial] plan must be measured, then it surely must fail." *United States v. Common-*

[5] This Court has rejected a similar "bottom line" defense under Title VII that discrimination against women in a particular program can be justified by proving that the system as a whole treats women "fairly." *Connecticut v. Teal*, 457 U.S. 440 (1982).

wealth of Virginia, 852 F. Supp. 471, 475 (1994), *aff'd*, *VMI II*, 44 F.3d 1229 (4th Cir. 1995). The lower courts concede that VWIL does not offer the "historical benefit and prestige" afforded men at VMI. *VMI II*, 44 F.3d at 1241. "[T]he contrast between [the proposed VWIL program and VMI] on all the relevant tangible and intangible criteria is so palpable as not to require detailed recitation." *Id.* at 1250. Even assuming that the VWIL proposal is able to realize its goals, "it will necessarily be a pale shadow of VMI in terms of the great bulk, if not all of those criteria." *Id.*

> The student and eventual graduate of VWIL will not be able to call on the prestigious name of "VMI" in seeking employment or preference in her various endeavors; the powerful political and economic ties of the VMI alumni network cannot be expected to open for her; the prestige and tradition of her own fledgling institution cannot possibly ever achieve even rough parity with those of VMI.

Id. Judge Phillips concluded that "[i]t is difficult to believe that one who had a free choice between [these] schools would consider the question close." *Id.*

D. The Only Constitutional Remedy is to Admit Qualified Women to VMI

Once a federal court finds that a state has unlawfully excluded a group of students from a public educational program, the only appropriate remedy is for the state to admit the excluded individuals and to remedy the effects of the prior discrimination. *See, e.g., Brown I*, 347 U.S. at 493; *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956) (ordering the immediate admission of a black student into the University of Florida Law School, the only law school in the state); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948) (upholding immediate admission of a black student to the only public law school in Oklahoma).

Having decided to provide a military-style education at VMI, Virginia must offer that opportunity to men and women on equal terms. Women are entitled to the opportunity for an education that is equal to that offered men at VMI, not a "substantively comparable" program that lacks the historical benefit and prestige of a degree from a venerable institution established over 150 years ago. *See Faulkner II*, 51 F.3d 450-51 (Hall, J., concurring); *VMI II*, 52 F.3d at 93 (Motz, J., dissenting).

III

THIS CASE OFFERS THE COURT AN OPPORTUNITY TO ANSWER THE UNRESOLVED QUESTION OF WHETHER STRICT SCRUTINY APPLIES TO GENDER CLASSIFICATIONS

Virginia's decision to "remedy" the unlawful exclusion of women from VMI by creating a separate and deliberately unequal program at a private women's college, funded almost entirely by VMI alumni, should be considered inherently suspect. Virginia's proposal is based solely upon generalizations and stereotypes about women that would be rejected out of hand if applied to racial or ethnic minorities. It reinvokes a history of exclusion of women from public education and denies women access to a prestigious public educational program based solely upon an inherited identifying trait over which they have no control, rather than on the basis of her individual ability and accomplishments. It is apparent that Virginia's attempt to create a separate and plainly unequal program, rather than admit women to VMI, is not substantially related to any important state interest and thus cannot survive even so-called intermediate scrutiny. It is equally apparent, however, that the intermediate scrutiny test has been unevenly applied by the lower courts and, as this case demonstrates, has often failed to protect the equal rights of women. For all of these reasons, Virginia should be required to prove that the continued exclusion of women from VMI is narrowly tailored to meet a compelling governmental interest.

On several recent occasions this Court explicitly has reserved the issue of whether strict scrutiny applies to gender classifications. *J.E.B.*, 114 S. Ct. at 1425 n.6 ("once again [the Court] need not decide whether classifications based on gender are inherently suspect"); *Harris v. Forklift Sys. Inc.*, 114 S. Ct. 367, 373 (1993); *Hogan*, 458 U.S. at 724 n.9; *Stanton v. Stanton*, 421 U.S. 7, 13 (1975). In *J.E.B.*, this Court reaffirmed without qualification "what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause." *J.E.B.*, 114 S. Ct. at 1422. This Court's decisions under the Fourteenth Amendment "reveal[s] a strong presumption that gender classifications are invalid." *J.E.B.*, 114 S. Ct. at 1433 (Kennedy, J., concurring). That is so because gender is not usually relevant to any legislative classifications. *See Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973). State policies that exclude women, like those that exclude racial minorities, historically have been rooted in prejudicial attitudes about the relative abilities and roles of men and women. *J.E.B.*, 114 S. Ct. at 1422.

Citing the plurality opinion in *Frontiero*, which applied strict scrutiny in reviewing a gender classification, this Court summarized the "long and unfortunate history of sex discrimination" that pervades this nation's history:

> [T]hroughout much of the 19th century *the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.* Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children . . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right — which is itself 'preservative of other basic civil and political rights' — until adoption of the Nineteenth Amendment half a century later.

J.E.B., 114 S. Ct. at 1425 (citing *Frontiero*, 411 U.S. at 685 (emphasis added)); *see also Mathews v. Lucas*, 427 U.S. 495 (1976) (historic legal and political discrimination based upon sex, like discrimination based on race, has been severe and pervasive).

Clarifying the appropriate standard of review would provide essential guidance to lower courts as to application of intermediate scrutiny. In *J.E.B*, Justice Kennedy noted that "the intermediate scrutiny test" does not "provide a very clear standard in all instances." *J.E.B.*, 114 S. Ct. at 1433-34 (Kennedy, J., concurring). Similarly, Justice Stevens observed in *City of Cleburne v. Cleburne Living Center*, "our cases have not delineated three — or even one or two — such well-defined standards." 473 U.S. 432, 451 (1985) (Stevens, J., concurring). The lower courts repeatedly have complained that the standard provides little guidance. *See, e.g., Lamprecht v. FCC*, 958 F.2d 382, 398 n.9 (D.C. Cir. 1992) (referring to intermediate scrutiny as indeterminate); *Coral Constr. Co. v. King County*, 941 F.2d 910, 931 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992) ("We are cognizant of the problems with intermediate scrutiny"); *Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 734 F. Supp. 1274, 1303 (E.D. Pa. 1990). Prior decisions have not required the resolution of this issue because most sex-based classifications have failed to meet even a more permissive standard. *See, e.g., J.E.B.*, 114 S. Ct at 1425 n.6. This case, likewise, can be resolved within the framework established by *Hogan* and *J.E.B.*, but Ms. Mellette respectfully submits that jurisprudential and practical considerations militate in favor of clarifying that classifications based on sex, like those based on race and ethnicity, require strict scrutiny.

VMI II and *Faulkner II* exemplify the serious confusion surrounding application of the appropriate level of review. In upholding a "separate and unequal" program for women, the Court of Appeals in *VMI II* held that different facilities for men and women could be justified upon generalized "dif-

ferences" between men and women as a group, even if individual women like Nancy Mellette can meet all of the qualifications of VMI or The Citadel. The Court of Appeals ignored the holdings of this Court in *J.E.B. and Hogan* rejecting classifications based upon generalizations about men and women as groups. Instead of treating such generalizations as suspect, it held that "intermediate scrutiny" presumes, as a starting point, that there are acknowledged differences between women and men, not just in their roles in human reproduction, but in their psychology, temperament and emotional characteristics. Intermediate scrutiny was designed to *eliminate* such assumptions, not validate them. *Craig v. Boren*, 429 U.S. 190, 198-99 (1976); *J.E.B.*, 114 S. Ct. at 1425; *see also Cleburne*, 473 U.S. at 440.

In addition, legal scholars have noted the confusion that has arisen among lower courts as to which standard of scrutiny to apply to gender-based affirmative action programs after this Court's decision in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (establishing strict scrutiny as standard of review for race-based affirmative action plans). *See, e.g.*, S. Oliver, Jr., *A Survey of Post-Croson Developments*, 38 Loyola L. Rev. 7, 36 (1992); T. Aleinkoff, A *Case For Race-Consciousness*, 91 Colum. L. Rev. 1060, 1095 n.168 (1991). One irrational result has been that, in some federal courts, some remedial measures for sex discrimination have been judged under strict scrutiny, while others have been judged under intermediate scrutiny. *Compare, e.g., Conlin v. Blanchard*, 890 F.2d 811 (6th Cir. 1989), *aff'd*, 947 F.2d 944 (6th Cir. 1991) (per curiam) (applying strict scrutiny to invalidate program), *with, Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992) (applying intermediate scrutiny to uphold program). This pattern of inconsistency is not likely to abate given this Court's recent decision in *Adarand*, subjecting race-based affirmative action programs to strict scrutiny.

Although women have won significant legal gains since the early 1970s, the need still exists for a consistent nationwide application of principles of women's equality before the

law. It is still true that "in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena." *Frontiero*, 411 U.S. at 686. Once a court finds that a state has invidiously discriminated against women, its decision to perpetuate the exclusion of women should be subject to strict scrutiny to ensure that the remedial choice is necessary to fulfill a compelling state interest.

CONCLUSION

For the reasons stated above, this court should declare that the exclusion of women from VMI violates the right to equal protection under the Fourteenth Amendment and order the immediate admission of women into VMI.

Dated: New York, New York
November 17, 1995

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Nos. 94-1941 and 94-2107

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,
v.
COMMONWEALTH OF VIRGINIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE EMPLOYMENT LAW CENTER, A PROJECT OF THE LEGAL AID SOCIEY OF SAN FRANCISCO, EQUAL RIGHTS ADVOCATES, INC., CHINESE FOR AFFIRMATIVE ACTION, NATIONAL ECONOMIC DEVELOPMENT AND LAW CENTER, HUMAN RIGHTS ADVOCATES, WOMEN'S EMPLOYMENT RIGHTS CLINIC (GOLDEN GATE UNIVERSITY SCHOOL OF LAW), PROFESSOR MARIA BLANCO, PROFESSOR CONNIE DE LA VEGA, PROFESSOR MARCI SEVILLE, AND PROFESSOR STEPHANIE WILDMAN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

As organizations and individuals concerned with securing full equality of opportunity in education, employment, and contracting, *amici* have a strong interest in this case, and therefore respectfully submit this brief. A full recitation of their interests in this case is contained in the Appendix hereto.

The written consents of the parties to the submission of this brief have been lodged with the Clerk pursuant to Rule 37.2.

INTRODUCTION

Since its establishment by the Commonwealth of Virginia in 1839, the Virginia Military Institute (VMI) has excluded women from admission to its unique, adversative training program. VMI's mission is to graduate "citizen-soldiers" who will provide leadership in civilian life and the military. Focusing on character development and leadership training, VMI's educational program stresses physical and mental rigor, equality of treatment, lack of personal privacy and cultural indoctrination. After more than a century of women being denied the right to a VMI-type education, the United States challenged VMI's male-only admissions policy under the Equal Protection Clause of the Fourteenth Amendment.

In an apparent contradiction of terms, the district court held that VMI's male-only admission policy was substantially related to the important state interest of promoting "diversity" of education through a single-sex education program. *United States v. Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991). Although the Court of Appeals for the Fourth Circuit expressed concern that women be offered the unique benefits of a VMI-type of education, it upheld VMI's single-sex program. In so doing, the court ordered the State to "formulate, adopt, and implement a plan that conforms with the Equal Protection Clause of the Fourteenth Amendment." *United States v. Virginia*, 976 F.2d 890, 900 (4th Cir. 1992) (*VMI I*). The court remanded the case for further proceedings to determine whether there were constitutional alternatives for providing women with a similar education short of actually admitting women to VMI.

To comply with the court's order, the State proposed an alternative program—the Virginia Women's Institute for Leadership (VWIL)—designed specifically to address the

"different educational needs of women" in the quest to produce female citizen-soldiers. The proposed VWIL program is but a mere shadow of the full educational experience offered at VMI. Glaringly absent from the VWIL proposal is VMI's unique military model, including its critical adversative method. This is not the only difference between these two programs. While the VMI curriculum focuses on math and sciences, VWIL would not offer a Bachelor of Science degree. Engineering degrees would only be conferred if VWIL students entered a joint program and attended a private Missouri university for two years.

Physical rigor, deemed an essential component of the VMI educational experience, would be all but lost at VWIL where the athletic and training facilities are substantially less sophisticated and extensive. In addition to these programmatic disparities, VWIL could not match the prestige associated with a VMI degree. VWIL simply would not enjoy the 150-year history and tradition associated with VMI, and its graduates cannot expect to have equivalent support from the powerful VMI alumni network. Despite all of this, the district court approved the VWIL plan. *United States v. Virginia*, 852 F.Supp. 471 (W.D. Va. 1994).

Three years later the Fourth Circuit affirmed the state's VWIL proposal, applying an unprecedented "special intermediate scrutiny" test. *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995) (*VMI II*). The court deferred to the "state's election of educational techniques [because] the purpose of providing single-gender education is *not pernicious* and falls within the range of the traditional governmental objective of providing citizens higher education." *Id.* at 1239 (emphasis supplied). Relying heavily on arcane notions about the relative capabilities of women and men, the court justified an all-male VMI by endorsing the dissimilar "female" version: VWIL.

In evaluating the VWIL program, the court departed from the two-prong intermediate scrutiny standard as

recently articulated in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). Ignoring significant disparities between the programs, the court focused on whether men and women would have "opportunities to obtain substantively comparable benefits." Finding no pernicious motive for the sex-based exclusion and concluding that VMI and VWIL would be comparable despite vast differences, the court approved the VWIL proposal. This intermediate scrutiny analysis finds no basis in this Court's precedents and should be expressly disapproved. Consequently, this Court may overturn these decisions under a correctly applied intermediate scrutiny analysis.

Amici also urge this Court to adopt strict scrutiny for invidious gender-based discrimination such as VMI's exclusion of women. Should the Court apply strict scrutiny in this case, it should reconsider the implications of applying strict scrutiny to remedial and non-invidious programs that are designed to assist members of particular groups in overcoming burdens disproportionately faced. Adoption of the strict scrutiny standard for invidious, intentional, gender-based discrimination—although a monumental step forward in the quest for women's rights—may harm women who currently benefit from existing affirmative action and other gender-based remedial programs if such programs are also subject to the demanding strict scrutiny test.

This Court's decisions in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Pena*, —— U.S. ——, 115 S. Ct. 2097 (1995) establish a standard requiring "consistency" in evaluating both "invidious" and "benign" classifications. This requirement undermines the remedial purpose of programs that seek to rectify intentional, invidious discrimination. A truly consistent approach would consider the nature of the classification—benign or invidious—and tailor the level of scrutiny to its underlying purpose. The Fourteenth Amendment contemplates the use of such classifications, even if they favor members of one sex or

race, to combat discrimination. "[E]ven if we completely disregard our history of racial injustice, race is not always irrelevant to sound governmental decisionmaking." *Croson*, 488 U.S. at 512 (Stevens, J., concurring in part and concurring in the judgment).

This nation's painful history of discrimination continues to this day. Remedial classifications that promote inclusion do not suffer from the invidious character of classifications that stigmatize and harm, and need not be subject to the highest scrutiny. This Court should seize the opportunity to finally acknowledge that gender-based discrimination deserves strict scrutiny, and to strike down the "consistent" application of the strict scrutiny standard to both invidious and remedial classifications.

ARGUMENT

I. VMI'S EXCLUSION OF WOMEN VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION.

The United States Constitution guarantees all persons equal protection under the law. U.S. CONST. amends. V, XIV. For more than twenty-five years, this Court has applied a heightened level of scrutiny to classifications based on gender. *Reed v. Reed*, 404 U.S. 71 (1971). This two-prong standard requires that classifications based on gender: (1) be supported by legitimate and important state interests; and (2) be substantially related to those interests. *Craig v. Boren*, 429 U.S. 190, 197 (1976). This Court has demanded an "exceedingly persuasive justification" for sex-based classifications, and has rejected those that reflect outdated stereotypes of women's roles and abilities. *Hogan*, 458 U.S. at 724 (1982); *J.E.B. v. Alabama ex rel. T.B.*, ——U.S. ——, 114 S. Ct. 1419 (1994).

The case now before this Court threatens to destroy a quarter-century of progress for women. The Fourth Cir-

cuit's opinions in *VMI I* and *VMI II* constitute a radical departure from the intermediate scrutiny standard.

A. VMI Does Not Have a Legitimate and Important Interest That Justifies Its Exclusion of Women.

VMI must demonstrate an "exceedingly persuasive justification" for its discriminatory policy. *Hogan*, 458 U.S. at 724. The Fourth Circuit failed to address this prong of the intermediate scrutiny standard. *See VMI II*, 44 F.3d at 1237. Had it done so, that court would have discovered that VMI's proferred interests are suspect and contain stereotypical assumptions prohibited by the Equal Protection Clause.

1. *The Fourth Circuit's Deference to VMI's* Post Hoc *Justifications for Exluding Women Was Unwarranted, and This Court Should View These Justifications with Suspicion.*

As Judge Phillips noted in his dissent below, finding a state interest to support the exclusion of women from VMI presents "a real problem of identification in this case." *VMI II*, 44 F.3d at 1246. When VMI opened its doors more than 150 years ago, it did not contemplate alternatives to a male-only admissions policy, but simply incorporated implicit assumptions regarding men and women that were prevalent at the time. Not only were women denied full participation in political or civil life, but they were excluded from the military realm altogether. Relegated to home and hearth, nineteenth-century women could not vote, "hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children." *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973).

Thus, the only interests articulated to justify VMI's exclusion of women are necessarily after-the-fact "rationalizations, compelled by the exigencies of this litigation rather than the actual purpose" of VMI. *VMI II*, 44 F.3d at 1247 (Phillips, J., dissenting). This Court has viewed

such justifications with skepticism. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 653 (1974) (Powell, J., concurring in result); *Frontiero*, 411 U.S. 677 (1973). In such circumstances, the Equal Protection Clause requires that these interests be subject to rigorous examination to determine whether they reflect "archaic and stereotypic notions." *Hogan*, 458 U.S. at 725. Moreover, the convoluted history of the interests offered to justify excluding women from VMI warrants close scrutiny by this Court.[1]

Here, however, the Fourth Circuit inappropriately allowed VMI's articulation of interests to enjoy significant deference "so long as the purpose [was] not pernicious and [did] not violate traditional notions of the role of government . . ." *VMI II*, 44 F.3d at 1237. Deference is not appropriate here, *see Califano v. Goldfarb*, 430 U.S. 199, 210-11 (1977), and undermines the integrity of the heightened scrutiny standard normally applied to gender classifications. Moreover, the purported interests here are not the reasoned deliberations of an elected democratic body to which deference may be appropriate. *Id.* at 212. It is the policy of the VMI Board of Visitors, and not the Commonwealth of Virginia, that keeps VMI an all-male institution. *United States v. Virginia*, 766 F. Supp. at 1412, 1419. The Commonwealth's initial failure to defend the classification renders the legitimacy and importance of any state interest all the more dubious.[2] *See Kirchberg v. Feenstra*, 450 U.S. 455, 460 n.7 (1981,

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[1] Interests proffered include the goal of "diversity in education" through maintaining VMI's all-male status and "distinctive educational method," *United States v. Virginia*, 766 F. Supp. at 1411; VMI's mission of producing "citizen-soldiers, educated and honorable men who are suited for leadership in civilian life," *VMI I*, 976 F.2d at 898; and the "objective of providing single-gender education" adapted differently for men and women, *VMI II*, 44 F.3d at 1237.

[2] The VMI Foundation, the VMI Alumni Association, and private organizations associated with VMI all intervened after the Commonwealth of Virginia declined to defend this suit. *United States v. Virginia*, 766 F. Supp. at 1408.

2. *VMI's Purported Interest in "Single-Sex Education" is Impermissible Because It Circumvents Scrutiny and Encompasses Gender Stereotypes.*

VMI claims a legitimate and important interest in single-sex education simply for the sake of single-sex education. *VMI II*, 44 F.3d at 1237-39. Asserting that single-sex institutions are "pedagogically justifiable" without more does not prove they are constitutional. *See Hogan*, 458 U.S. at 731. In accepting this justification, the Fourth Circuit bypassed the rigorous two-part analysis required.[3] VMI must demonstrate that the classification is substantially related to furthering some separate goal, not simply offer the circular justification that "[VMI's] single-sex status would be lost . . . if it were to admit women." *See United States v. Virginia*, 766 F. Supp. at 1413.

VMI's fluctuating explanation for maintaining an all-male institution belies its true purpose. In *VMI I*, it was not the "maleness" of VMI that precluded admitting women, but the purported need for homogeneity of gender. 976 F.2d at 897. Faced with a court order requiring remedy, however, VMI now claims that its program is suitable only for men. According to testimony offered by the State, "[w]hat women need is a system that builds their sense of self-efficacy," not VMI's rigorous methodology designed for men and their "inflated sense of self-efficacy." *VMI II*, 44 F.3d at 1234.

The Fourth Circuit embraced these stereotypical assumptions. According to the court, the sex-segregated system offered by the State will build women's "sense of self-efficacy through meeting challenges, developing self-discipline, meeting rigor and dealing with it, and having successes." *VMI II*, 44 F.3d at 1234 (internal quotation omitted). Acknowledging that "there remains some disagreement among the experts," the court relies on "common experience" to find that single-sex institutions have intrinsic value because "the focus is properly on matters other than relationships between the sexes." *Id.* at 1238-39. VMI's purported interest is nothing more than an assertion that women are unqualified and unable to succeed in the rigorous, adversative program at VMI.

[3] The court below admits as much: "[O]nce the state's objective is found to be an important one, the classification by gender is by definition necessary for accomplishing the objective and might thereby bypass any equal protection scrutiny." *VMI II*, 44 F.3d at 1237.

"[I]f a statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." *Hogan*, 458 U.S. at 725. Here, the justification both for excluding women from VMI and for remedying that constitutional violation signifies that women are unable to meet challenges or have success at VMI, and must be protected from their inevitable failure. Just as women were once "protected" from the rigors of the practice of law, *Bradwell v. Illinois*, 83 U.S. 442, 16 Wall. 130 (1873), VMI's admissions policy seeks to "protect" women from the rigors of a military education. Laws that perpetuate these arcane characterizations of women's abilities have long since been rejected by this Court. *See Hogan*, 458 U.S. at 725 n.10.

3. *This Court Should Reject VMI's Purported Interest in "Citizen-Soldiers."*

In the end, VMI is left only with the objective expressed in the VMI mission statement: to produce "citizen-soldiers, educated and honorable men . . . who are suited for leadership in civilian life and who can provide military leadership when necessary." *VMI I*, 976 F.2d at 893. It appears, however, that an invidious motive—discrimination against women—drives the continuing male-only admissions policy. *See VMI II*, 44 F.3d at 1247 (Phillips, J., dissenting).

B. Even if VMI's Interests Were Legitimate and Important, Its Exclusion of Women Is Not Substantially Related to Furthering Those Interests.

Even if VMI's objective of producing "citizen-soldiers" were legitimate and important, excluding women must be substantially and directly related to the achievement of

that goal to withstand constitutional scrutiny. *Hogan*, 458 U.S. at 730. A close relationship between the objective and the classification "assures that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Id.* at 725-26. Where the state's purpose is "as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex . . . [T]his is doubly so where the [classification] benefit[s] . . . those without need for special solicitude." *Orr v. Orr*, 440 U.S. 268, 283 (1979).

VMI's exclusion of women is not substantially and directly related to its interest in "citizen-soldiers." The Fourth Circuit speculated that admitting women would "destroy aspects of VMI's program which lie near the core of its holistic system and . . . deny [women] the very benefit they sought by their admission" because the program's adversity, physical training and lack of privacy might change. *VMI II*, 44 F.3d at 1233. The court failed to examine the connection between the purported interest and the exclusion of women, focusing instead upon the relationship between VMI's existing program and its exclusive policy. It is the relationship between the classification and producing citizen-soldiers, however, that is at issue here. The program itself is merely a means to this end. VMI does not have an important interest in continuing its educational program exactly as it is.[4]

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[4] Although VMI's educational program may rest on a male-only tradition, "[m]any of our people's traditions, . . . such as *de jure* segregation and the total exclusion of women from juries, are now unconstitutional even though they once co-existed with the Equal Protection Clause." *J.E.B.*, —— U.S. ——, 114 S. Ct. at 1429 n.15 (internal quotation omitted). VMI cannot now maintain that it has an important interest in continuing its historical discrimination.

Careful analysis of the relationship between VMI's exclusion of women and its purported objective of citizen-soldiers demonstrates that VMI's justifications rest on arcane characterizations of women. VMI's contention that admitting women would require lower physical standards is nothing more than an overbroad generalization that women are the weaker sex. *See Hogan*, 458 U.S. at 725 (generalizations that members of one gender are innately inferior are illegitimate). "[E]ven if a measure of truth can be found in some . . . gender stereotypes . . ., that fact alone cannot support discrimination on the basis of gender . . ." *J.E.B.*, —— U.S. ——, 114 S. Ct. at 1427 n.11. VMI does not, nor can it dispute that some women would be able to meet the existing physical requirements. *United States v. Virginia*, 766 F. Supp. at 1438. The exclusion of women cannot be justified simply because some women cannot meet VMI's physical standards: some men cannot meet these standards either. That some women may fit the overbroad characterization VMI supplies does not change the fact that VMI excludes women willing and able to complete its program.

Moreover, VMI has failed to demonstrate that its uniform and exceedingly high physical training standards are necessary to produce citizen-soldiers. Other physical training programs have graduated men and women who have achieved the highest military and political positions. *See United States v. Virginia*, 766 F. Supp. at 1428 (describing West Point training program). VMI's insistence that women would undermine its physical training program is simply an attempt to retain its exclusionary tradition.[5]

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[5] VMI contends that the inevitable dual physical standards for men and women would cause "jealousy and resentment" among the ranks. *VMI I*, 976 F.2d at 896; *United States v. Virginia*, 766 F. Supp. at 1440. Presumably any integration of an all-male institution that wishes to remain exclusive would cause resentment. This Court should not condone the anticipated discriminatory reactions of cadets. *Cf. Loving v. Virginia*, 388 U.S. 1 (1967).

VMI's contention that the adversative nature of its program would have to change is similarly unconvincing. It is conceded that "the VMI methodology could be used to educate women" and that "some women . . . may prefer the VMI methodology." *United States v. Virginia*, 852 F. Supp. at 481. *See also United States v. Virginia*, 766 F. Supp. at 1436 (between 1988 and 1990, VMI received inquiries from 347 women). The Fourth Circuit, however, found that single-gender institutions are necessary because the adversative process "would destroy . . . any sense of decency that still permeates the relationship between the sexes." *VMI II*, 44 F.3d at 1239. This assumption rests on stereotypes of men as chivalrous protectors of the sensibilities of women from foul language and moral depravity. *See Bradwell*, 83 U.S. at 446 ("Man is, or should be, woman's protector and defender."); *J.E.B.*, —— U.S. at ——, 114 S. Ct. at 1423 (women historically excluded from juries because of the "ostensible need to protect women from the ugliness and depravity of trials"). The State has failed to show that "adversative training" is substantively related to its citizen-soldier goal.[6]

VMI also asserts that complete lack of privacy requires that the entire school be one sex. At VMI, there are no locks on room doors, no curtains on the windows in those doors, and there is "a total lack of privacy in the barracks." *VMI I*, 976 F.2d at 894. Similar intrusive living conditions, however, could be created by simply building a separate barracks for women. *See United States v. Virginia*, 766 F. Supp. at 1443 (describing West Point facilities). This Court must question whether this "privacy" justification is merely a pretext for excluding women, particularly given the success of the coeducational United States military academies that graduate far more leaders than does VMI every year.

[6] The State's assertion that the proposed, non-"adversative" program to be established at Mary Baldwin is "substantively comparable" to VMI undermines its own allegiance to the adversative technique. "[I]f the proposed program at Mary Baldwin is truly 'substantively comparable' to the VMI program, the 'adversative' training must not be critical to the VMI program . . ." *United States v. Virginia*, 52 F.3d 90, 93 (4th Cir. 1995) (Motz, J., dissenting from denial of rehearing *en banc*).

VMI has failed to demonstrate why its all-male program is necessary to further its purported interest in citizen-soldiers. Means other than excluding women from VMI are available to reach its claimed interest, but VMI refuses to consider them. *See Orr v. Orr*, 440 U.S. at 283. The other justifications offered incorporate impermissible stereotypes and archaic and overbroad generalizations about the roles and abilities of women. *See Hogan*, 458 U.S. at 724-25. VMI has failed to demonstrate an exceedingly persuasive justification for excluding women and this Court should strike down the discriminatory policy.

II. THE PROPOSED VWIL PROGRAM WOULD NOT OFFER WOMEN A VMI EDUCATION AND IS NOT A SUFFICIENT REMEDY FOR THE STATE'S VIOLATION OF EQUAL PROTECTION.

In framing a remedy to repair the denial of a constitutional right, the task is to correct the condition that offends the Constitution. The nature of the violation determines the scope of the remedy. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971). A district court must tailor the scope of the remedy to fit the nature and extent of the violation. *Hills v. Gautreaux*, 425 U.S. 284, 293-94 (1976). The remedy must be designed to eliminate as far as possible the discriminatory effects of the past as well as bar like discrimination in the future. *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

In this case, the violation as articulated by the appellate court in *VMI I* is that the State offers VMI's unique benefits to men and not to women. 976 F.2d at 899. In finding a constitutional violation, the appellate court stressed the distinctive nature of VMI's type of education: "VMI's military program is *absolutely unique*. *No other*

school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI." *Id.* at 898 (emphasis supplied, internal quotations omitted). The court ordered the State to remedy the violation by admitting women to VMI, by withdrawing support from VMI, or by establishing a parallel program for women. *Id.* at 900. The remedy selected by the State is the establishment of an all-female Virginia Women's Institute for Leadership at Mary Baldwin College, a private women's college. The sufficiency of this remedy is now before the Court.

The Virginia Women's Institute for Leadership does not yet exist, and would not offer women VMI's "unique and intense" education program utilizing "adversative" techniques. Women enrolled in the proposed school would instead: take courses in leadership, including research relevant to women and leadership; participate in Saturday seminars sponsored by more senior students on designated subjects; complete a leadership externship; participate in a speakers series; organize and carry out community service projects; participate in ROTC; take physical education, including a "cooperative confidence building program"; and participate in the "largely ceremonial" Virginia Corps of Cadets. *VMI II*, 44 F.3d at 1234. Indisputably, "VWIL would not be organized under the pervasive military regimen that exists at VMI." *Id.*

In short, the Commonwealth of Virginia continues to limit the unique benefits of a VMI-type of education, complete with prestige, tradition and alumni influence, to men. Moreover, VMI continues to challenge the Fourth Circuit's holding that offering the VMI program to men and not to women violates the Constitution. At some future date, women may be able to enroll in a completely different non-"adversative" educational program with no tradition and at best unknown access to prestige or alumni influence. This proposal cannot correct the State's violation of equal protection, even as narrowly defined by the

Fourth Circuit in *VMI I*. Instead, that violation is aggravated by the specter of a two-school system that segregates men and women into separate spheres by restricting prestige and military training to men, and relegating women to community service and a ceremonial corps.

III. THE CONTEMPLATED TWO-SCHOOL SYSTEM, CONSISTING OF VMI AND THE PROPOSED VWIL, CANNOT SURVIVE INTERMEDIATE SCRUTINY.

The proposed VWIL program has not been independently challenged as a violation of equal protection, nor has the contemplated two-school system of VMI and VWIL been so challenged. The proposed VWIL program is offered by the State as a remedy to the violation found in *VMI I*. Despite this procedural posture, in *VMI II* the Fourth Circuit purported to subject the existing VMI and the proposed VWIL to intermediate scrutiny as a two-school system. In a further departure, the appellate court declined to apply intermediate scrutiny as articulated in *Craig v. Boren*, and instead employed a newly created "special intermediate scrutiny" test that replaces the two-prong standard with a singular focus on whether the State offers "substantively comparable" benefits to men and women.

A. The Commonwealth Has Not Shown That the Maintenance of an All-Male VMI and the Creation of an All-Female VWIL Is Substantially Related to Important State Interests.

In *VMI I*, the Fourth Circuit held that VMI's use of single-sex "adversative" techniques is a constitutional means to achieve an interest in "citizen-soldiers," but that the State must offer the "unique benefits" of a VMI-type education to both men and women. 44 F.3d at 890. The State subsequently proposed a completely different type of education for women only, asserting a new interest in promoting leadership and education through single-sex programs that vary for men and for women. 44 F.3d at 1239-41. The shifting justifications offered in this case

only heighten the suspicion warranted where the State's position is fashioned by the *post hoc* findings of state experts and task force members, and where VMI continues to contend that it need not provide *any* remedy for its exclusion of women.

The proposed two-school system that has emerged confirms that suspicions are rightly raised. Even if obtaining pedagogical benefits or promoting leadership were deemed by this Court to be sufficiently important to justify a sex-based classification, the creation of two vastly different educational programs, one for males and one for females, is not substantially related to achieving these objectives.[7] Indeed, fundamental distinctions between VMI and VWIL correlate to stereotyped views about the relative abilities of men and women. While VMI retains a military-style education for males only, females are relegated to a program that stresses leadership development and community service. Only VMI offers a math and science focus and a Bachelor of Science degree. Similarly, the athletic and physical training facilities at VMI are far more extensive and sophisticated than those at Mary Baldwin College. These disparities serve to perpetuate the discrimination and disadvantage that women already face in obtaining military education, pursuing careers in math or science, or participating in athletics.[8]

Were the State's position upheld by this Court, then any state would be permitted to offer completely different

[7] Even if the expert testimony offered by the Commonwealth were uncontroverted, this evidence does not suggest that vast disparities among the educational options available to males and to females are substantially related to the achievement of pedagogical benefits. *See United States v. Virginia*, 766 F. Supp. at 1434.

[8] Women are often discouraged from pursuing careers in math and science, and face disparities in access to athletics. *See* MYRA SADKER AND DAVID SADKER, FAILING AT FAIRNESS: HOW AMERICA'S SCHOOLS CHEAT GIRLS 120-28 (1994); AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS 28-30 (1982); NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA GENDER-EQUITY STUDY: SUMMARY OF RESULTS tables 1-2 (1992).

educational options to men and to women pursuant to the determinations of a state-appointed task force, with merely a citation to expert testimony regarding the benefits of single-sex education. The Fourth Circuit's ruling in *VMI II* apparently presumes that the assumptions and legal reasoning of an earlier era still hold today. In *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971), the district court denied a challenge from male plaintiffs to the exclusive policies of a women's college in light of the fact that another state-supported college limited enrollment to men. Applying a rational basis standard[9] and citing pedagogical opinion, the *Williams* court found that the two schools were justified simply because the all-male school was designated as a military school while the all-female school "gave special attention to many courses thought to be specially helpful to female students," described by the state legislature as including stenography, sewing, dress-making, needlework, cooking, housekeeping, "and such other industrial arts as may be suitable to their sex." *Id.* at 136, n.3. The *Williams* analysis does not survive to the present.

The appellate court's analysis attempts to revive the deferential standard applied in *Williams*, and in so doing similarly endorses separate spheres for women and men. While conceding that "there remains some disagreement among the experts about the extent of the benefits of single-gender education," the Fourth Circuit concluded that it should "defer to a state's selection of educational techniques" so long as "the purpose of providing single-

[9] Among other cases, the *Williams* court cited *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding statute providing minimum wages for women but not men); *Radice v. New York*, 264 U.S. 292 (1924) (upholding statute limiting hours of night work of women); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding statute barring women from bartending); *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding voluntary jury duty for women but compulsory for men). 316 F. Supp. at 136. This Court has since repudiated such cases. *See Hogan*, 458 U.S. at 725-26 n.10.

gender education is not pernicious." *VMI II*, 44 F.3d at 1239. While such deference was commonly applied prior to *Reed v. Reed*, 404 U.S. 71 (1971), in 1995 it is completely at odds with the jurisprudence of equal protection developed by this Court over nearly twenty-five years and recently articulated in *Hogan*.

B. The Contemplated Two-School System Would Not Even Offer Substantively Comparable Benefits to Men and to Women.

The State asserts that the contemplated two-school system of VMI and VWIL is constitutionally permissible because it would offer men and women "substantively comparable" benefits in that both programs teach discipline and prepare students for leadership. The district court approved the plan, finding that the cooperative method to be offered at VWIL would achieve "substantially similar outcomes." *United States v. Virginia*, 852 F. Supp. at 476. The Fourth Circuit agreed:

> Both VMI and VWIL are focused on *results* beyond simply awarding an undergraduate degree. Both seek to teach discipline and prepare students for leadership. The missions are similar and *the goals are the same*.

VMI II, 44 F.3d at 1240 (emphasis supplied). The appellate court then upheld the contemplated two-school system, and ordered judicial review to ensure that the proposed VWIL program, when compared with VMI, would not tend to "lessen the dignity, respect, or social regard" of women. *Id.* at 1242.

This Court has not endorsed a comparability standard for single-sex schools,[10] and has never recognized a comparability standard based on outcome or educational goals alone.[11] In the context of race, a higher standard—"separate but equal"—has been rejected as inadequate. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Even if an outcome analysis were adequate, the two-school system proposed by the State would not even offer men and women the same degrees.[12] That women may obtain one state-identified benefit—leadership training—at another program does not alter the fact that women are denied virtually all other benefits of the VMI experience and degree.

[10] Nearly two decades ago, the Court summarily affirmed the Third Circuit's opinion in *Vorchheimer v. Sch. Dist. of Phila.*, 532 F.2d 880 (3rd Cir. 1976), *aff'd*, 430 U.S. 703 (1977). A summary affirmance does not enjoy the full precedential value of a case argued on the merits and disposed of by written opinion. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

The little case law that exists regarding the comparability of segregated schools does not limit itself to whether the schools share similar goals, but focuses instead upon the various components of schools, including courses, facilities and faculty, as well as such intangibles as prestige and alumni networks. *See Vorchheimer v. Sch. Dist. of Phila.*, 532 F.2d 880, 881-82 (3rd Cir. 1976), *aff'd*, 430 U.S. 703 (1977). In *Sweatt v. Painter*, this Court stressed intangible qualities "incapable of objective measurement": "Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." 339 U.S. 629, 634 (1950).

As the dissent noted in *VMI II*, "the contrast between the two [schools] on all the relevant tangible and intangible criteria is so palpable as not to require detailed recita-

[11] In *Sweatt v. Painter*, 339 U.S. 629 (1950), that the plaintiff barred from an all-white law school could obtain a legal education from another all-black institution did not determine the issue of whether the two schools at issue were "substantially equivalent." *See also Hogan*, 458 U.S. at 723-24 n.8 (1982) (that plaintiff could obtain credit in state-supported coeducational nursing program did not determine constitutional permissibility).

[12] Unlike VMI, Mary Baldwin does not have a math and science focus and does not offer a Bachelor of Science degree. *United States v. Virginia*, 852 F. Supp. at 503. Engineering degrees are only conferred if the VWIL student spends three years at Mary Baldwin College and another two years at Washington University in St. Louis, Missouri. *Id.* at 503.

tion." 44 F.3d at 1250 (Phillips, J., dissenting). VMI offers a military education in a military framework. VMI cadets are required to wear uniforms, live in barracks, eat meals together in a mess hall, complete a boot camp-type regimen, abide by a rigid hierarchy of students, comply with minute regulation of behavior, and regularly take part in parades and drills. *United States v. Virginia*, 766 F. Supp. at 1421-27. In contrast, VWIL would offer leadership education, confidence building and community service requirements. VWIL students would not live in barracks or wear uniforms; beyond ROTC participation, the program would impose no aspect of the rigorous military culture of VMI. *United States v. Virginia*, 852 F. Supp. at 494-98. The appellate court's focus on leadership development as the measure of comparability circumvents scrutiny of the traditional assumptions embodied in the two-school system.[18]

As the dissent correctly noted, VWIL will necessarily be "but a pale shadow" of VMI. "The student and eventual graduate of VWIL will not be able to call on the prestigious name of 'VMI' in seeking employment or preference in her various endeavors; the powerful political and economic ties of the VMI alumni network cannot be expected to open for her; the prestige and tradition of her own fledgling institution cannot possibly ever achieve even rough parity with those of VMI." *VMI II*, 44 F.3d at 1250. The district court conceded that "even if all else were equal between VMI and [VWIL], the VWIL program cannot supply those intangible qualities of history, reputation, tradition, and prestige that VMI has amassed over the years." *United States v. Virginia*, 852 F. Supp. at 475. Where women are excluded by the State from a powerful institution and relegated to a less prestigious alternative, the Fourteenth Amendment must bar such discrimination and the inevitable stigma that it imparts.

[18] Furthermore, the facilities, faculty, student body and resources offered by the two programs are different. The athletic and physical training facilities at VMI are far superior to those that would exist at VWIL. *United States v. Virginia*, 852 F. Supp. at 503. The faculty at Mary Baldwin College is not as accomplished as the faculty at VMI. *United States v. Virginia*, 852 F. Supp. at 502. While VMI has a student body numbering around 1,300, VWIL would likely begin with a class of 25 to 30 students. *VMI II*, 44 F.3d at 1243-44. VMI's endowment is $131 million—the largest of any undergraduate institution in the United States on a per-student basis. VWIL's endowment is $19 million. *United States v. Virginia*, 852 F. Supp. at 502-03.

IV. THE COURT SHOULD TAKE THIS OPPORTUNITY TO ADOPT THE STRICT SCRUTINY STANDARD FOR HARMFUL GENDER-BASED CLASSIFICATIONS WHICH SEEK TO EXCLUDE OR STIGMATIZE.

This case provides the Court with the opportunity to revisit its standard of review for invidious gender-based discrimination and squarely hold that such discrimination merits strict scrutiny. VMI's discriminatory policy seeks to disadvantage women on the basis of harmful and outmoded stereotypes. Such pernicious and invidious discrimination should be subject to strict scrutiny. Furthermore, the distinction between invidious discrimination and remedial or affirmative programs must inform the level of review.

A. The Appropriate Standard of Review Remains an Open Question.

This Court has never formally held that gender-based classifications are inherently suspect. Instead, various Justices have consistently reminded litigants and lower courts that application of the equal protection doctrine for women requires a searching inquiry into the classification at issue, but that the status of women as a suspect class has yet to be determined. *J.E.B.*, —— U.S. at —— n.6, 114 S. Ct. at 1425 n.6; *Harris v. Forklift Systems*, —— U.S. ——, ——, 114 S. Ct. 367, 373 (1993) (Ginsburg, J., concurring); *Hogan*, 458 U.S. at 724 n.9. Now is the time for this Court to eradicate the historical remnants of sex discrimination by extending to women and men the full protection of the Fourteenth Amendment.

This result can only be achieved by subjecting invidious gender classifications to the most rigorous and exacting judicial scrutiny under the Constitution.

B. Women Face Historic and Current Pernicious Discrimination.

Over the past quarter-century this Court has come to recognize our nation's "long and unfortunate history of sex discrimination." *Frontiero*, 411 U.S. at 684 (plurality). As Justice O'Connor observed in *Hogan*, "[h]istory provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function." 458 U.S. at 725 n.10.

Ironically, this Court long endorsed these legislative actions. *See Bradwell*, 83 U.S. at 446 ("in view of the peculiar characteristics, destiny, and mission of women, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men . . ."); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) ("[t]he fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the states from drawing a sharp line between the sexes."). In a series of now discredited cases, this Court also upheld labor laws enacted in the nineteenth and early twentieth centuries designed to protect women based on their perceived frailty. *See, e.g., Muller v. Oregon*, 208 U.S. 412 (1908). It is only recently that the Court has invalidated such measures as violative of equal protection under the law. *See Reed v. Reed*, 404 U.S. at 76.

Although the Court has since recognized that "[n]o longer is the female destined solely for the home and the rearing of the family and only the male for the marketplace and the world of ideas," *Stanton v. Stanton*, 421 U.S. 7, 14 (1975), barriers to women's full equality still

exist. Despite women's gains, discrimination continues to impose obstacles to women's full participation in public life. As recently as last year, this Court addressed a system of ongoing discrimination in jury selection. *J.E.B.*, —— U.S. ——, 114 S. Ct. 1419 (1994). Whether it is employers erecting "glass ceilings" in the workplace, schools and universities devoting fewer resources to women's athletics, or the continued exclusion of women from VMI, both overt and subtle discrimination remains a painful reality that deprives women of opportunities solely because of their sex. Equal protection doctrine must recognize that the continuing discrimination women face is rooted in outmoded perceptions of their proper roles rather than realistic assessments of their abilities relative to men.

A plurality in *Frontiero* recognized that because sex is an immutable characteristic which has been grounds for denying basic civil and political rights to women for centuries, "classifications based on sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." 411 U.S. at 688. The Court has condemned continuing forms of discrimination which "serve[] to ratify and perpetuate invidious, archaic and overbroad stereotypes about the relative abilities of men and women," *J.E.B.*, —— U.S. at ——, 114 S. Ct. at 1422. Nevertheless, this Court has consistently declined to extend to invidious sex-based distinctions the searching judicial inquiry warranted by this history of discrimination.

As women continue to surmount historic barriers, the realm of "valid" distinctions that society perceives to exist between the sexes becomes ever narrower. This Court should acknowledge that classifications which exclude one gender are inherently suspect and unlikely to reflect relevant differences between the sexes. Adoption of a strict scrutiny standard for invidious gender-based discrimination will enable women to overcome the remaining vestiges

of centuries of officially sanctioned discrimination, and accord both women and men the protection that the Fourteenth Amendment's guarantee requires.

C. This Court as Well as State Courts Have Increasingly Recognized the Need for a More Exacting Standard to Judge Gender-Based Discrimination.

This Court has steadily imposed more stringent levels of scrutiny in gender challenges. Beginning with a heightened rational basis standard under *Reed v. Reed*, 404 U.S. 71 (1971), the Court went on in *Frontiero* to enumerate the reasons why gender-based discrimination deserves strict scrutiny. 411 U.S. 677 (1973). In *Craig v. Boren*, 429 U.S. 190 (1976), the Court held that sex-based classifications must be "substantially related to an important governmental interest." Since that case, Justices have used increasingly exacting language to describe the level of scrutiny. In *Hogan*, the Court specified that the asserted state interest must be "exceedingly persuasive." 458 U.S. at 724 (1982).

State courts have already recognized that discrimination against women merits strict scrutiny under state constitutional guarantees. At least ten state supreme courts have interpreted state constitutional equal rights amendments or equal protection clauses in their state constitutions to mandate strict scrutiny.[14] This Court should similarly subject invidious gender-based distinctions to the highest standard of judicial scrutiny.

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[14] *Hewitt v. State Accident Ins. Fund*, 294 Or. 33, 653 P.2d 970 (1982); *Sail'er Inn v. Kirby*, 5 Cal.3d 1, 485 P.2d 529 (1971); *In Re Marriage of Flaherty*, 31 Cal.3d 637, 646 P.2d 179 (1982); *LeClair v. LeClair*, 137 N.H. 213, 624 A.2d 1350 (1993); *People v. Salinas*, 191 Colo. 171, 174, 551 P.2d 703, 705 (1976); *Rand v. Rand*, 280 Md. 508, 374 A.2d 900 (1977); *Darrin v. Gould*, 85 Wash. 2d 859, 540 P.2d 882 (1975); *In the Interest of McLean*, 30 Tex. Sup. Ct. J. 206, 725 S.W.2d 696 (1987); *Lowell v. Kowalski*, 380 Mass. 663, 405 N.E.2d 135 (1980); *Illinois v. Ellis*, 57 Ill. 2d 127, 311 N.E.2d 98 (1974); *Page v. Welfare Comm.*, 170 Conn. 258, 365 A.2d 1118 (1976).

V. CLASSIFICATIONS WHICH SEEK TO ASSIST MEMBERS OF ONE SEX WHO ARE DISPROPORTIONATELY BURDENED ARE NOT INVIDIOUS, AND DO NOT MERIT THE HIGHEST LEVEL OF REVIEW.

If this Court adopts a standard of strict scrutiny for sex-based discrimination, it should also recognize that remedial and non-invidious classifications do not merit the highest standard of scrutiny. Under the Court's current reasoning, the adoption of strict scrutiny may threaten programs that seek to assist members of a particular group in overcoming unique burdens and to thereby promote full societal integration.

While strict scrutiny is the appropriate standard by which to judge classifications that reflect outmoded stereotypes or stigmatize on the basis of sex or race, classifications that seek to *include* or to overcome continuing social disadvantage serve a different governmental purpose and do not merit the highest level of judicial inquiry. This Court's decisions in *Croson*, 488 U.S. 469 (1989) and *Adarand*, —— U.S. ——, 115 S. Ct. 2097 (1995) establish a standard of consistency in evaluating both "invidious" and "benign" classifications. Such a standard, however, eviscerates the purpose and meaning of the Fourteenth Amendment's promise of equal protection: it fails to recognize the moral and historical difference between a tradition of exclusion and an ethic of inclusion. Consistency is a slender reed upon which to fashion Fourteenth Amendment protections.

A. Relevant, Compensatory Classifications Are Within the Original Intended Purpose of the Fourteenth Amendment.

The original intent of the drafters of the Fourteenth Amendment was to permit race-conscious remedial and beneficial government programs. The very Congress which

enacted the Fourteenth Amendment went on to adopt a number of explicitly race-based social welfare programs.[15] That Congress specifically appropriated funds and services "to educate and improve the moral and intellectual condition of . . . the colored youth of the nation," and to relieve the poverty of the freed slaves. Ch. 103, 12 Stat. 796 (1863). Where it created programs available to both blacks and whites, the Reconstruction-era Congress expressly said so. *See* the Southern Public Lands Act of 1866, ch. 127, 14 Stat. 66, 67 (1866). Classifications intended to remedy the present effects of discrimination lie within the central historic purpose of the Fourteenth Amendment. "If this conflicts with idealistic equality, that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved. . . ." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 405 (1978) (Blackmun, J., concurring in part and dissenting in part).

It was in the context of officially sanctioned and injurious discrimination designed to maintain racial separation and subordination that the strict scrutiny standard developed.[16] The standard was designed to challenge that discrimination which harmed, stigmatized, or burdened groups on the basis of race or other immutable characteristics, not to invalidate compensatory legislation. Applying the standard in *McLaughlin v. Florida*, 379 U.S. 184

[15] For a comprehensive account of the race-based enactments of the Reconstruction-era Congress, *see* Brief of the NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae* 7, *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) (No. 76-811, Oct. Term, 1976).

[16] *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944) (upholding internment of Japanese-Americans during World War II); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating prohibition on interracial marriage); *cf. Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (finding that racial classification segregating schools "generates a feeling of inferiority . . . that may affect [schoolchildren's] hearts and minds in a way unlikely ever to be undone.").

(1964), the Court noted that "courts must reach and determine the question whether the classifications drawn in a statute are reasonable *in light of its purpose*—in this case, whether there is an *arbitrary* or *invidious* discrimination." 379 U.S. at 191 (1964) (emphasis added). As recognized by Justice O'Connor in *Croson*, "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." 488 U.S. at 493. *See also Bakke*, 438 U.S. at 357-58 (1978) (opinion concurring in the judgment in part and dissenting in part) ("racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more.").

B. Programs That Seek to Assist Members of a Group in Overcoming Unique Burdens Need Not Be Subject to Strict Scrutiny.

While strict scrutiny properly challenges invidious discrimination, efforts to assist persons in overcoming disparate burdens and to promote inclusion of all on an equal footing should not be subject to the highest level of judicial inquiry. "[The] principles outlawing the irrelevant or pernicious use of race [are] inapposite to racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination." *Fullilove v. Klutznick*, 448 U.S. 448, 518 (1980) (Marshall, J., concurring).

Harms inflicted on the basis of membership in a disadvantaged class logically merit responses tailored to the nature of the burden.[17] As Justice Blackmun observed in

[17] Under some circumstances, remedial educational programs for girls or women might be permissible as a means for addressing past and present educational discrimination against women. *See Hogan*, 458 U.S. at 728. Such discrimination includes historical and present disparities in access to math, science and athletics. *See* MYRA SADKER AND DAVID SADKER, FAILING AT FAIRNESS: HOW

Bakke, "in order to get beyond racism, we must first take account of race." 438 U.S. at 407 (Blackmun, J., dissenting in part). *See also Croson*, 488 U.S. at 512 (Stevens, J., concurring in part and concurring in the judgment) ("race is not always irrelevant to sound governmental decisionmaking");[18] *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 317 (1986) (Stevens, J., dissenting) (race conscious measures promoting inclusion should be evaluated under a different standard).

Classifications that promote inclusion do not stigmatize or harm, but promote equality of opportunity by ameliorating the effects of past and continuing disadvantages. "In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately bur-

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AMERICA'S SCHOOLS CHEAT GIRLS 15-76 (1994); AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS (1992); NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA GENDER-EQUITY STUDY: SUMMARY OF RESULTS (March 1992). Although such programs may target a particular group, they are neither invidious nor do they seek to exclude. Rather, they are vehicles to promote full inclusion and integration in the larger society for those who may face particular obstacles to access.

[18] Support for this position is found in international treaties as well. The International Convention on the Elimination of All Forms of Racial Discrimination provides that "[s]pecial measures taken for the sole purpose of serving adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such individuals or groups equal enjoyment or exercise of human rights or fundamental freedoms shall not be deemed racial discrimination." International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (adopted by the United States Sept. 8, 1992), art. 1, § 4. *See also* International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (adopted by the United States Sept. 8, 1992), arts. 2(2), 3, 26. A treaty ratified by the United States is the supreme law of the land. U.S. CONST. art. VI, cl. 2.

dened."[19] *Hogan*, 458 U.S. at 728. Justice Stevens, dissenting in *Adarand*, criticized the assumption "that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority." —— U.S. at ——, 115 S. Ct. at 2120. Compensatory measures should be evaluated in light of "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 460 (1985) Marshall, J., concurring) (citations omitted).[20]

While this Court lauded "consistency" in *Croson* and *Adarand*, true consistency mandates an application of the

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[19] While assisting women in overcoming historic and present economic disparities is an important and even compelling state interest, affirmative measures must be substantially related to such an interest. In some early cases applying the intermediate scrutiny test, this Court has not always closely examined the relationship, relying instead upon broad generalizations. *See Kahn v. Shevin*, 416 U.S. 351 (1974); *Califano v. Webster*, 430 U.S. 313 (1977). A more precise analysis is found in *Hogan*, in which the Court found that a gender-based admissions policy at a state-supported nursing school was not substantially related to any compensatory purpose. 458 U.S. at 730.

[20] Justice O'Connor remarked in *Croson* that "absent searching judicial inquiry . . . there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegimate notions of racial inferiority." *Croson*, 488 U.S. at 493 (1989). Indeed, judicial inquiry is always warranted in reviewing either racial or gender classifications. However, in *Hogan*, Justice O'Connor was able to "smoke out" the pernicious nature of the classification by applying the lesser intermediate scrutiny standard, despite the state's claim of good intentions: "[A]lthough the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification." 458 U.S. at 730.

strict scrutiny standard to all classifications, including gender classifications, that perpetuate the exclusion of any person from the benefits and opportunities of full citizenship on the basis of impermissible criteria. Where classifications seek to combat historic exclusion and afford true equality of opportunity to all individuals, consistency commands recognition of the continuing need for appropriately designed affirmative measures.

CONCLUSION

For all the reasons stated above, the Court should reverse the decisions below and direct entry of judgment for the petitioner.

Respectfully submitted,

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APPENDIX

APPENDIX

Amici, the Employment Law Center, A Project of the Legal Aid Society of San Francisco, Equal Rights Advocates, Inc., Chinese for Affirmative Action, National Economic Development and Law Center, Human Rights Advocates, Women's Employment Rights Clinic, Professor Maria Blanco, Professor Connie de la Vega, Professor Marci Seville, and Professor Stephanie Wildman are law firms, civil rights organizations, and law professors who seek to secure and protect the civil and constitutional rights of minorities, women and low income persons. *Amici* have a long-standing and abiding interest in securing the greatest constitutional protection for women and minorities under the Fourteenth Amendment to the United States Constitution. Similarly, *amici* advocate that government agencies be afforded the greatest latitude in their endeavor to increase opportunities for groups previously denied equal opportunity.

They have also represented minority- and women-owned business enterprises in cases involving race and gender-conscious relief, including *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Northeastern Florida Contractors of America v. Jacksonville*, —— U.S. ——, 113 S. Ct. 2297 (1993); and *Adarand General Constructors Inc. v. Pena*, —— U.S. ——, 115 S. Ct. 2097 (1995).

The Employment Law Center (ELC) is the principal project of the Legal Aid Society of San Francisco which was founded more than eighty years ago to provide legal assistance to poor immigrants in San Francisco. For the last two decades, the ELC has focused almost exclusively on employment-related issues that affect the working poor. A pioneer in the employment law field, the ELC is nationally recognized for its expertise in this area.

Now in its twenty-second year, Equal Rights Advocates, Inc. (ERA) is one of the country's oldest women's law centers dedicated to the empowerment of women through

the establishment of their economic, social, and political equality. Since its inception, ERA has specialized in litigating cases and pursuing public policy initiatives designed to assure women equal access to all of society's benefits including employment, education, and public accommodations. A cornerstone of ERA's efforts to gain entry for women into nontraditional jobs has been to secure and maintain strong, effective affirmative action programs.

Chinese for Affirmative Action ("CAA") is a private, non-profit California corporation with over twenty-seven years of involvement in affirmative action. The organization has been a party in class action lawsuits seeking to integrate police and fire departments. In this role, and in numerous other circumstances, CAA has negotiated the terms of affirmative action programs and has provided expertise to many public and private organizations on how to fashion affirmative action programs.

The National Economic Development and Law Center provides legal and technical assistance to organizations promoting employment and economic opportunities for low-income persons. In recognition of the relationship between women's segregation in poorly compensated occupations and the high number of women living in poverty, the Law Center has been engaged, for the past two years, in efforts to break down the barriers which restrict women's access to more highly compensated jobs. Sex discrimination in employment and education is significant among these factors.

Human Rights Advocates is a non-profit California corporation that provides education about the application of international human rights law in both domestic and international fora. The ultimate objective is to advance the cause of human rights so that basic protections are afforded to all individuals. Human Rights Advocates has submitted *amicus curiae* briefs in cases involving individual rights when international standards might be of aid in interpreting state and federal laws.

The Women's Employment Rights Clinic is part of Golden Gate University School of Law. The clinic is staffed by students who work under the direct supervision of the clinic attorneys who are also professors at the law school. The clinic advises, counsels and represents clients in a variety of employment-related matters. Our emphasis is on serving low income clients who often cannot afford legal services when they confront employment problems. Many of our clients are women of color who face both race and gender-based discrimination on the job.

Professor Maria Blanco is a professor of law at Golden Gate University Law School where she specializes in women's economic rights.

Professor Connie de la Vega is a professor of law at the University of San Francisco School of Law specializing in international human rights law.

Professor Marci Seville is a professor of law at Golden Gate University Law School where she specializes in women's economic rights.

Professor Stephanie Wildman is a professor of law at the University of San Francisco School of Law where she specializes in sex and race discrimination and feminist theory.

In light of *amici*'s dual concern for strengthening constitutional protections for women and maintaining programs designed to remedy past and present pervasive discrimination, they urge this Court to overturn the decisions of the Fourth Circuit and require VMI to admit women to its program. While *amici* believe that this is the necessary outcome under the intermediate scrutiny standard, they also suggest that the Court could take this opportunity to decide that strict scrutiny is the appropriate standard for invidious and intentional gender-based classifications. However, in doing so, *amici* urge this Court to recognize the difference between classifications based on invidious, intentional discrimination and classifications intended to

promote inclusion and equal opportunity by taking race or gender into account.

Amici law firms have submitted *amicus* briefs to this Court in numerous sex discrimination cases, including *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991); *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987); *Harris v. Forklift Systems Inc.*, —— U.S. ——, 114 S. Ct. 367 (1993); and *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA,

Petitioner,

—v.—

COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER BY THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS; THE CENTER FOR WOMEN POLICY STUDIES; THE PROGRAM ON GENDER, SCIENCE AND LAW; STANLEY ARONOWITZ, PH.D.; STEPHANIE J. BIRD, PH.D.; PATRICIA CAMPBELL, PH.D.; BLYTHE MCVICKER CLINCHY, PH.D.; MARY CRAWFORD, PH.D.; FAYE J. CROSBY, PH.D.; KAY DEAUX, PH.D.; CYNTHIA FUCHS EPSTEIN, PH.D.; MICHELLE FINE, PH.D.; CAROL GILLIGAN, PH.D.; MARY S. HENIFIN, M.P.H., J.D.; RUTH HUBBARD PH.D.; VILMA HUNT, B.D.S., M.A.; ANNE S. KASPER, PH.D.; PENELOPE KEGEL-FLOM, PH.D.; EVELYN FOX KELLER, PH.D.; VALERIE E. LEE, ED.D.; ZELLA LURIA, PH.D.; MAUREEN PAUL, M.D., M.P.H.; DIANE S. POLLARD, PH.D.; SUSAN REVERBY, PH.D.; JO SANDERS; BERNICE SANDLER, ED.D.; ELLEN WAHL; LESLIE WOLFE, PH.D.

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Interest of *Amici Curiae*

Amici curiae[1] are scientists, scholars, educators and professional organizations with an interest in the scientific issues raised in this case.[2] The research conducted by some *amici* was explicitly relied upon by the parties and the courts below. *Amici* are appearing in this proceeding to discuss the scientific issues addressed by the lower courts and their relevance to the legal questions presented.

Summary of Argument

Virginia Military Institute,[3] a state-supported all-male school, excludes otherwise qualified female students solely because of their sex. The question before this Court on cross-petitions for a writ of *certiorari* is whether that admissions policy violates the Equal Protection Clause and, if so, whether the violation can be cured by the creation of a separate single-sex program for women.

VMI has sought to justify its single-sex status by relying on purportedly scientific evidence relating to alleged physiological and psychological differences between the sexes and the purported benefits to males from single-sex education at VMI. Even if these claims were accurate, however, they would be insufficient as a matter of law, because sex-based classifications that rely on stereotypes violate equal protection even if some statistical support "can be conjured up." *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1427 n.11 (1994). Likewise, in defense of the remedial plan, VMI offers "'the very stereotype the law condemns.'" *Id.* at 1426. None of the interests asserted by VMI provides the "exceedingly persuasive" rationale necessary to justify a policy that

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[1] This brief is filed on behalf of Petitioner. The parties have consented to the filing of this brief, and their letters of consent have been filed pursuant to Rule 37.3 of the Rules of this Court.

[2] Individual statements of interest appear in an Appendix to this brief.

[3] Respondents are referred to herein collectively as "VMI."

explicitly relies on stereotypes and perpetuates historical patterns of discrimination: it is not relevant if "the benefited class profits from the classification," nor can there be a legitimate interest in providing men with a college "composed of members of a particular...gender." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 731 n.17 (1982); *J.E.B.*, 114 S. Ct. at 1430 (O'Connor, J. concurring), 1434 (Kennedy, J. concurring). Point I.

To avoid the plain import of the law, the lower courts relied on tenuous theories about alleged sex-based differences and the purported benefits of single-sex education for men. These propositions were often advanced by witnesses with no apparent expertise, whose testimony lacks necessary indicia of scientific validity and evidentiary reliability. *See* Fed.Rules Evid. Rules 702-703, 28 U.S.C.A.; *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786 (1993). The record oversimplifies highly complex areas of research and misinterprets scholarly research, including that of Carol Gilligan and Valerie Lee, *amici curiae* herein. Such "proofs" are clearly inadequate to justify discrimination, both in themselves and as a matter of law. Point II.

ARGUMENT

Assertions about differences between the sexes have historically been advanced to rationalize social arrangements that have disadvantaged women. For example, the "craniology" movement of the nineteenth century sought to "prove" that intelligence was a function of brain size, to establish male intellectual preeminence over women and justify the denial of educational and employment opportunities for women.[4] In *Muller v. Oregon*, 208 U.S. 412, 421 (1908) (Bradley, J., concurring), the Court deferred to the "abundant testimony of the medical fraternity," finding that women's biological vulnerability justified

[4] Marian Lowe, *Social Bodies: The Interaction of Culture and Women's Biology, in Biological Woman: The Convenient Myth* 100-06 (Hubbard, et al. eds., 1982); Stephen J. Gould, *The Mismeasure of Man* (1981).

limiting their hours of work.[5] The history of the legal and social disenfranchisement of women demonstrates the seemingly timeless appeal of pseudo-scientific and oversimplified arguments about "women's nature" to rationalize sex discrimination. Women's constitutional right to equal access to state educational opportunities should rest, not on problematic theories about purported sex-based biological and psychological differences, but rather on the enduring principles expressed in the Equal Protection Clause.

I. VMI'S SEX-BASED ADMISSION POLICY VIOLATES EQUAL PROTECTION.

The overriding purpose of the Equal Protection Clause is to guarantee inclusion of historically disenfranchised segments of the population within the political, social and economic fabric of American life. The goal of inclusion is so significant that this Court has recognized a compelling interest in governmental efforts to eradicate sex discrimination, even when a negative impact on the right of freedom of association is asserted. *E.g., Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984). In modern equal protection jurisprudence, this Court has never endorsed the perpetuation of historical discrimination against women, or sanctioned the claim, pressed by VMI, that males are entitled to exclusive access to a valuable state benefit because they have historically monopolized it.[6]

[5] As a result, women were disqualified from a variety of lucrative jobs. Alice Kessler-Harris, *Out to Work* (1982); Judith Baer, *The Chains of Protection* (1978).

[6] This Court has rejected sex-based classifications even when used to advance otherwise valid purposes. *E.g., Reed v. Reed*, 404 U.S. 71 (1971) (administrative and cost concerns); *Craig v. Boren*, 429 U.S. 190 (1976) (preventing traffic accidents); *Orr v. Orr*, 440 U.S. 268 (1979) (assisting needy spouses "a legitimate and important objective"). The only relevant exception does not apply here: when such a classification "intentionally and directly assists members of the sex that is disproportionately burdened" and "compensate[s] for discriminatory barriers faced by women." *Hogan*, 458 U.S. at 728-29.

A. VMI's Policy of Exclusion Is Based on Impermissible Generalizations and Stereotypes.

Rather than affirm the constitutional priority of inclusion, the lower courts affirmed the exclusion of those who, they admit, are qualified but for their sex. They reached this extraordinary result in reliance on stereotypes and generalizations that concededly do not apply to all women. At the liability trial, VMI's witnesses testified that women are physically weaker;[7] that they are more emotional and cannot take stress as well as men;[8] that they are less motivated by aggressiveness and suffer from fear of failure; and that more than a hundred physiological differences contribute to a "natural hierarchy" in which women cannot compete with men.[9] While acknowledging "some contribution to ballet," one witness expressed the view that women excel over men only in their "joint mobility" and their ability to produce and nurse babies.[10] Other witnesses testified to psychological and developmental differences between men and women, in particular men and women's alleged "different ways of knowing," women's "ethic of caring" and men's "ethic of justice."[11] These and other assertions about sex-based differences, with women's deficiencies assumed if not stated, were embraced by the trial court and formed the basis for the remedial plan. *United States v. Commonwealth of Virginia*, 766 F.Supp. 1407, 1412-13, 1434, 1439-40 (W.D.Va. 1991) ("*VMI I*").

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[7] *United States v. Commonwealth of Virginia, et al.*, (W.D.Va.)(90-01260-R). Transcript of Proceedings, April 11-14, 1991 (liability) (hereafter "Tr.") at 519-22 (Toffler), 902-06 (Davis).

[8] *Id.* at 810-11 (Bissell).

[9] *Id.* at 931-33 (Davis).

[10] *Id.* at 932, 939-40 (Davis). Much of the testimony on these issues is inherently unreliable. *See* Point II, *infra*. While insufficient to prove the truth of the assertions, this testimony exposes the stereotypes at the core of VMI's practices and the proposed remedial plan.

[11] *Id.* at 376-78 (Conrad), 686 (Richardson).

The remedial plan likewise "recognizes...that 'men and women are different....' [and] seeks to utilize educational methodologies that are appropriate to women...."[12] Under the plan, the Virginia Women's Institute for Leadership ("VWIL") at Mary Baldwin College ("MBC") is proposed as a means to avoid admitting women into VMI. It is not intended to address the needs of women who seek entrance to VMI, nor is it anticipated that it will be "equal" to VMI in any material respect; rather, VMI and VWIL are said to be "comparable" in terms of "leadership" training.[13] "If VMI marches to the beat of a drum, then [VWIL] marches to the melody of a fife...." *United States v. Commonwealth of Virginia*, 852 F.Supp. 471, 484 (W.D.Va. 1994) ("*VMI II*").

VWIL will differ from VMI on every relevant measure: curriculum (what is offered); pedagogy (how it is offered); and educational consequences (post-graduate measures). VMI's "extreme adversative" education is characterized by a highly disciplined, authoritarian and hierarchical model of instruction and leadership.[14] The program purports to meet the developmental needs of "relatively undisciplined"[15] adolescent males who "come in with [an] inflated sense of self-efficacy that must [be] knocked

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[12] *United States v. Commonwealth of Virginia* (4th Cir. Nos. 94-1667, 94-1717) (remedy) Joint Appendix (hereafter "J.A."), Vol. I at 43 (quoting *United States v. Commonwealth of Virginia*, 976 F.2d 891, 897 (4th Cir. 1992)).

[13] J.A. Vol.II at 620-1 (Tyson), 738 (Richardson). Concededly, the two schools cannot be "comparable" in terms of history, tradition, or prestige, as recognized by the court below. *United States v. Commonwealth of Virginia*, 44 F.3d 1229, 1241 (4th Cir. 1995) ("*VMI II*").

[14] J.A. Vol. II at 623-24 (Tyson), 598 (Wilson), 671 and 673 (Riesman).

[15] *Id.* at 666 (Riesman).

down."[16] VWIL, in contrast, is intended for "shy, self-distrustful young women"; it will be "supportive and encouraging. And [will promote] cooperative leadership, not chain-of-command,"[17] because "we really don't need to beat upityness [sic] and aggression and all of that out of young women."[18] The model for VWIL is "the young woman who went to a large coeducational high school...and was about to give up on the possibility that she could compete with young men....";[19] she is said to need a "sense of self-efficacy and competence."[20] Unlike VMI with its substantial curriculum in science and engineering, VWIL will not offer engineering courses, a physics major, or a Bachelor of Science degree.[21]

The generalizations and stereotypes on which the plan relies are clear. Heather Wilson, MBC Dean of Students, testified:

> The VMI model wasn't adopted [for VWIL] because young men and young women of 18 come to college, having had different experiences in their lives. I can't even tell you when it starts except that I know that a friend of mine is [a] clinical psychologist [and] has a four year old daughter who she is trying to raise very carefully....Her four year old's favorite movie is Aladdin....In the movie Aladdin, and this is representative of what young children are taking

[16] *Id.* at 598 (Wilson).

[17] *Id.* at 677-79 (Riesman).

[18] *Id.* at 572 (Fox-Genovese).

[19] *Id.* at 574 (Fox-Genovese).

[20] *United States v. Commonwealth of Virginia* (W.D.Va) (90-01260-R) Transcript of Proceedings Feb. 9-12, 14-15, 1994 (remedy) (hereafter "Tr. II") at 299 (Fox Genovese); J.A. Vol.II at 453-54 (Lott) and 623 (Tyson).

[21] J.A. Vol.II at 491-93 (Lott).

> in, the princess, even though she has a large tiger at her command, has to wait to be rescued by Aladdin.
>
> Children[s'] stories are filled with things like this....[W]omen internalize these messages; they should take the passive role not the active role....[22]

Wilson repeatedly offered generalizations and anecdotes, instead of evidence:

> young men [in fraternities] will paddle their pledges; they will brand them; they will make them consume alcohol and will make them eat disgusting things....Young women [in sororities] will give flowers, write poems....[23]

David Riesman, another VMI witness, offered a potpourri of inaccurate overgeneralizations:

> ...[W]omen at the present so often flounder [with regard to] [s]patial things, geometric things, topology, math and physics, and leadership itself...."
>
> ***
>
> When the boys have a chance to run on the school track, [t]hey run and they run and they run and they run....
>
> When girls have a chance to go up on the track, they don't stick at it long.
>
> ***
>
> One reason I suspect [women] don't do as well in verbal tests, they don't read as many sports stories as boys do.
>
> ***
>
> ...In the rat system [at VMI] one has one's buddies to

[22] *Id.* at 595-97. Anecdotes like this provide no basis for a generalization about girls. Some girls may reject messages from movies; others may have chosen to see "Aliens" instead of "Aladdin ."

[23] *Id.* at 599.

> endure it with one, and one is *being what boys are supposed to be*, brave, physically hardy, unafraid.[24]

Riesman testified that women who are "less self-distrustful" will also benefit from VWIL, because they need to be

> reminded that their leadership styles, while impressive, have also the hazard of being oppressive...[and that they should] depend more on persuasion or on cooperation, more on connectedness.[25]

Richardson conceded that "[t]here is not in the VMI paradigm a place for the woman leader who excels and does *those things that women are expected to do*...."[26]

Carol Lewis Anderson, a member of the MBC Board of Trustees, described "an education that suits a woman's style of learning":

> I will give you...just a few issues. One is that it not be confrontational and crude and mean. The toilet bowl is a good expression of *what is not suitable for women*.
>
> One that is encouraging...not one that is challenging in abusive ways.
>
> ***
>
> ...Men apparently...and my husband will attest to this from fraternity hazing that he has friends with whom he [w]as hazed who will be friends for life...because they experienced something together that was so horrible that it brought them together.

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[24] *Id.* at 684-85 and Tr.II at 538, 546 (emphasis added).

[25] J.A. Vol. II at 682 (emphasis added).

[26] *Id.* at 741-42 (emphasis added).

> Well, women bond, too, but *women bond from experiences that are wonderful*.[27]

The record is thus replete with classic, time-worn generalizations picturing women as passive, men as aggressive; women as peaceful, men as violent; women as cooperative, men as competitive; women as insecure, men as confident. The record is sprinkled with references to what males and females *should* do and *should* be, reflecting not only stereotypical notions about the proper roles of men and women but also the plain intent to create two institutions that encourage, if not require, students to conform to the stereotype for their sex.

Even proponents of the remedial plan ultimately conceded that alleged differences are *not* the result of innate differences, are *not* experienced by all members of the same sex the same way, and are, by definition, sometimes inaccurate generalizations. James Lott, MBC Dean of Students, testified that there "are no inherent differences in the way men and women learn,"[28] and Riesman testified that he has "known and...worked with many women who do not fit this picture at all."[29] Lott acknowledged that the adversative method is not "inherently or innately inappropriate" for women.[30] He also acknowledged that VWIL would not be appropriate for women who seek admission to VMI.[31]

Elizabeth Fox-Genovese, a historian who testified in support of the plan, analogized such women - who seek to go to VMI - to Myra Bradwell. She characterized their "high roller

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[27] Tr. at 450-52 (emphasis added).

[28] J.A. Vol.II at 440-41; and *see id.* at 474 (Lott), 624 (Tyson).

[29] *Id.* at 681.

[30] *Id.* at 472; *see also id.* at 521, 525-26.

[31] *Id.* at 540-42 (Lott). *See also id.* at 668 (Riesman), 578-79 (Fox Genovese).

ambition" as being "as much fancy as it is reality." In Bradwell's day, she claimed, "women that wanted to support themselves became nurses, teachers, librarians...." VWIL, she suggests, is intended to discourage women from such "high roller ambition" as the desire to attend VMI or "climb Everest because it is there."[32]

B. The Generalizations Offered By VMI Are Inaccurate and Misleading.

> The scientific record on questions of sex differences...is shaky at best. Examples of bias are numerous.... There are without doubt some behavioral differences between women and men. Yet the size of these differences is often smaller than purported and their appearance is often highly dependent on context.[33]

While it is undoubtedly true that there are average differences between the sexes, even VMI concedes and the trial court recognized that many individuals of both sexes do not conform to the "average" for their sex. Nonetheless, VMI succeeded in convincing the trial court that, because these generalizations had some ostensible statistical support, they were not stereotypes.[34] This conclusion is insupportable. In the professional literature, the "issue of stereotype accuracy really has two parts: first, the accuracy of the hypothetical average as a

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[32] *Id.* at 578-79.

[33] Kay Deaux and Mary Kite, *Thinking About Gender, in Analyzing Gender: A Handbook of Social Science Research* 97 (Hess & Ferree eds., 1987). Even observers of average differences do not claim a causal relationship between sex and specific behaviors or dispute the substantial overlap between the sexes. *See* Alice Eagley, *The Science and Politics of Comparing Women and Men*, 50 Am. Psych. 145 (1995). *See also* Elizabeth Fox-Genovese, *Feminism Without Illusions: A Critique of Individualism* 254 (1991) ("the vast majority of our social roles result from social choices, not from the dictates of biology...").

[34] *E.g.*, 766 F. Supp. at 1434 and J.A. Vol.II at 572 (Fox-Genovese).

description of the total population; and second, the fit of the general category to the individual case."[35] Even stereotypes that are accurate with regard to the "total population" can still be *in*accurate with regard to individuals within the population:

> The more pernicious aspect of stereotypes lies in the application of the general category, however imperfectly defined, to the case of the individual. Given the wide within-sex variation in virtually every trait or behavior associated with gender stereotypes, overgeneralization is axiomatic.[36]

Gender stereotypes represent "very general categories...refer[ing] to approximately half of the world's population."[37] They often have little predictive value:

> [A]t most, scientists can hope to discover generalizations that are true of 'some women' and 'some men'.... And then, of course, the research is concerned with discovering, for example, which men are more aggressive than which women. Asking general questions about males and females, men and women (where 'all men' or 'all women' is implicit)...[thus] serves to obscure the very substantial ways in which class, ethnic background, education, and a whole host of other social experiences

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[35] Kay Deaux & Mary Kite, *Gender Stereotypes in Psychology of Women: A Handbook of Issues & Theories* 113 (Denmark & Paludi eds., 1993) [hereinafter *Gender Stereotypes*].

[36] *Id. See also Webster's Third New International Dictionary* (Unabridged) (1986), which defines a stereotype as "...something conforming to a fixed or general pattern and lacking individual distinguishing marks or qualities; especially *a standardized mental picture held in common by members of a group and representing an over-simplified opinion*...(Emphasis added).

[37] Deaux & Kite, *Gender Stereotypes, supra*, at 115.

result in differences and similarities.... [38]

Stereotypes have a "prescriptive character...channeling the activities and choices individuals make and, in some instances, reinforcing the distinctions between women and men."[39] In other words, they become self-fulfilling prophesies. They also represent categorical thinking, which in turn invites invidious comparison:

> Men [are] typically seen as stronger and more active, characterized by high needs for achievement, dominance, autonomy, and aggression. Women, in contrast [are] believed to be more concerned with affiliation nurturance and deference.[40]

Stereotypes thus foster prejudice by causing people to "see things that are not there while ignoring things that are....These misperceptions, in turn, can serve to confirm the expectancies that a person has about members of stereotyped groups and ultimately perpetuate those stereotypes."[41]

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[38] Mary Brown Parlee, *Women, Peace and The Reproduction of Gender, in On Peace, War and Gender: A Challenge to Genetic Explanations* 106 (A.H. Hunter ed. 1991).

[39] Deaux & Kate, *Gender Stereotypes, supra*, at 112. *See also* Cynthia Fuchs Epstein, *Deceptive Distinctions: Sex, Gender, and the Social Order* 84 (1988) ("discrimination results from the expectations people have of others who belong to groups believed to possess certain traits").

[40] Deaux & Kite, *Gender Stereotypes, supra*, at 114. *See also* Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 17 (1982) ("the qualities deemed necessary for adulthood - the capacity for autonomous thinking, clear decision-making, and responsible action - are those associated with masculinity and considered undesirable as attributes of the feminine self").

[41] Deaux & Kite, *Gender Stereotypes, supra*, at 111 (reference omitted).

There are no psychological, behavioral or cognitive traits in which males and females do not overlap, and in most cases the area of overlap is larger than the area of difference.[42] In addition to misleading testimony about perceived psychological, behavioral and cognitive differences, VMI also presented a vast amount of testimony about alleged physical and physiological differences, much of which the trial court embraced.[43] For example, the trial court cited average differences between the sexes in body fat and aerobic capacity.[44] Body fat, like many characteristics, varies among individuals: even if the proportion of body fat for the "average" woman is 25%, for female gymnasts it is 15.5%, for sprint swimmers 14.6%, and for distance runners 15.2%-16.9%.[45] The conclusion that women have "[o]n the average...10% more body fat [which] imposes a burden on some kinds of physical performance," *VMI I*, 766 F. Supp. at 1433, does not accurately describe some women, and fails to account for the advantage body fat confers in some activities. For example, women have an advantage in long-distance swimming because body fat provides

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[42] Rhoda Unger & Mary Crawford, *Women and Gender* (2nd Ed.) (forthcoming 1996). Sex differences can only be understood if both central tendency (averages) and variability (range and distribution) are considered. Comparing the range and distribution for each sex demonstrates the extent of overlap between the sexes. *Id. See also* J.S. Hyde & M.C. Linn, *The Psychology of Gender* (1986).

[43] This evidence is apparently relevant to VMI's rigorous physical education program. However, VMI's goal is to produce "leaders," not athletes, and students are not selected based on their athletic ability, as demonstrated by the fact that almost half of the entering cadets do not meet the physical fitness standard. Tr. at 316-17 (King).

[44] *VMI I*, 766 F. Supp. at 1432-33.

[45] *See* T.D. Fahey, *Endurance Training, in Women and Exercise: Physiology and Sports Medicine, 2nd Ed.* 80 (Shangold & Mirkin eds., 1994); R.W. Hale, *Differences and Similarities Between the Sexes, in Caring for the Exercising Woman* 32 (Hale ed., 1991).

greater buoyancy and cold resistance.[46]

Even with regard to aerobic capacity, the significance of apparent differences is unclear: "there appears to be very little difference in ability to supply adequate oxygen to the tissues...indicat[ing] that this is not an area of significant difference between males and females."[47] Evidence of other physical differences is equally hard to interpret and apply. For example, assessing strength by measuring the ability to lift an object onto the tailgate of a truck favors males because greater height provides an advantage in such a task.[48] Physical ability can be measured in other ways to display women's strengths,[49] and comparisons could focus on women who are likely to apply to VMI, who might not conform to average data: "female and male athletes are more similar to one another than they are to non-athletic members within their own sexes."[50]

In sum, the concept of sex difference in this record is used

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[46] W.D. McArdle, *Essentials of Exercise Physiology* 111-12 (1994) ("[T]he record for an English Channel swim of 7 hours 40 minutes is held by a [woman]...the men's record [is] 8 hours 12 minutes.").

[47] Hale, *supra*, at 31, 34.

[48] The trial court found differences in the ability to lift an object to the height of the tailboard of a military truck and the ability to do push-ups. *VMI I*, 766 F. Supp. at 1433. Males also tend to have an advantage doing push-ups because of their lower center of gravity.

[49] *See* Myron Genel, *Gender Differences in Growth and Maturation: Are These Relevant for Athletic Competition?* 4 J.Women's Health 425 (1995) (measures of athletic performance that highlight "speed, agility and endurance" show smaller sex differences than those that emphasize strength; "some people have predicted that women's [long-distance running] times will exceed those of men in the next century").

[50] M. Boutilier & L. SanGiovanni, *Women and Sports: Reflections on Health and Policy, in Women, Health, and Healing: Toward a New Perspective* 209 (Lewin & Olsesen eds., 1985).

ambiguously and unscientifically in several respects: anecdotes are substituted for scientific measurement of representative samples of the population; variability (range and distribution) is ignored; and averages, which are central tendencies, are improperly used to predict the performance of individuals. Some women are tall, some men are short; some men are passive, some women are aggressive. Knowing that on average men are taller than women will indicate nothing about an individual's height; knowing a person's height does not reveal his or her sex. The remedial plan, an embodiment of stereotypical thinking, would ignore this reality, preferring instead to impose a "standardized mental picture" of each sex, even though it represents an "over-simplified opinion" that "see[s] things that are not there while ignoring things that are."

C. There Is No Constitutionally Sufficient Rationale To Justify a Continuing Exclusion of Women.

As shown above, VMI advances, as the justification for its discriminatory practice, "'the very stereotype the law condemns.'" *J.E.B.*, 114 S. Ct. at 1426 (citation omitted). VMI's position mirrors a classic pattern:

> much of the testimony...ignores individual differences among members of each sex and reads like 'ancient canards about the proper role of women'....The witnesses claimed that women...are not strict disciplinarians; that they are physically less capable...; that [others] take advantage of them...while male[s]...are strong father figures who easily maintain discipline....

Dothard v. Rawlinson, 433 U.S. 321, 343-44 (1977) (Title VII case) (Marshall, J., concurring in part and dissenting in part) (citation omitted). The Court has consistently rejected the contention that sex-based differences in the average justify discrimination based on sex. *See, e.g., Reed*, 404 U.S. 71 (more men than women likely to be qualified to administer estates); *Craig*, 429 U.S.190 (more men than women drink and drive); *Orr*,

440 U.S. 268 (more women than men require alimony).[51] In each of these cases, the statistics used to support the sex-based classification were inadequate to prove "that gender alone is an accurate predictor." *J.E.B.*, 114 S. Ct. at 1427.

Only last term this Court observed that it is irrelevant "if a measure of truth" underlies a stereotype; stereotypes are forbidden "even when some statistical support can be conjured up for the generalization." *J.E.B.*, 114 S. Ct. at 1427 n.11. In *J.E.B.*, the Court rejected the "quasi-empirical claim that men and women have different attitudes...." While acknowledging the fact that "the two sexes are not fungible," this Court nonetheless repudiated reliance on "gross generalizations." *Id.* at 1424, 1427 (citation omitted). This is because the Constitution protects the

> rights of individuals, not groups....'Government must treat citizens as individuals, not simply components of a racial [or] sexual...class.'

Id. at 1434 (Kennedy, J., concurring) (citation omitted).[52] Even assuming some real physical and biological differences between the sexes, it does not follow that such differences justify excluding

[51] VMI's claim that recruitment, "marketing" and fiscal considerations justify the remedial plan is unpersuasive under these precedents. The demand for both military school and single-sex education is quite small, J.A. Vol.II at 627 (Tyson), 676 (Riesman), and co-education might well increase demand. There is nothing in the record to indicate how many students choose VMI *because* it is single-sex, and how many attend *in spite of* that fact. Students might well select VMI to take advantage of the prestige and career opportunities it confers on graduates. *See United States v. Commonwealth*, 55 F.3d 90, 93 (4th Cir. 1995) (Motz, J., dissenting).

[52] The trial court relied on testimony that educational programs should be designed to meet the needs of the "average" student, not the "exception." *VMI I*, 766 F. Supp. at 1434. While this might be true for non-discriminatory programs, it fails to account for the obligation of public institutions to satisfy equal protection standards.

women from access to valuable state-supported benefits:

> [I]f the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.

Hogan, 458 U.S. at 725. The claim that the alleged pedagogical benefit to men justifies discrimination ignores the Court's admonition that it is irrelevant "whether the benefited class profits from the classification." *Id.* at 731 n.17.

None of the reasons advanced by VMI to justify exclusion of women survives constitutional scrutiny.[53] In *J.E.B.*, this Court considered the constitutionality of gender-based peremptory challenges in jury selection.[54] The state asserted that a "special" interest in "establishing the paternity of a child born out of wedlock" justified the practice, 114 S. Ct. at 1426 n.8, because men and women might be expected to react differently to such claims. The Court, however, concluded that the "only legitimate interest [the state] could possibly have" was the interest in "securing a fair and impartial jury." *Id.* Even though "the peremptory...helps produce fair and impartial juries," *id.* at 1431

[53] Three possible interests have been identified: the "intrinsic value" of single-sex education, the education of "citizen soldiers," and educational diversity. *VMI II*, 44 F.3d at 1246 (Phillips, J., dissenting). All, however, are "after-the-fact rationalizations." *Id.* at 1247.

[54] Like *J.E.B.*, this case involves explicit sex-based conduct. *Compare Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979) (veterans' preference disproportionately disadvantaged female civil servants, but male and female veterans qualified on the same basis) *with Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980) (intentional discrimination exists even where the classification is intended "'to favor [women], not to disfavor them'"). The assertion of a purportedly benign or neutral *reason* does not transform a sex-based barrier into a neutral practice. *See also International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991).

(O'Connor, J., concurring), "the Constitution guarantees a right only to an impartial jury, not to a jury composed of members of a particular race or gender." *Id.* at 1434 (Kennedy, J., concurring).

This analysis suggests that the "only legitimate interest [the state] could possibly have" here is an interest in providing quality education for qualified students. The right to an impartial jury enjoys considerably more constitutional protection than any claim to state-supported higher education, and the state's interest in promoting that right is substantial. Yet even this interest was insufficient to justify sex-based jury selection. Unlike the right of litigants to a fair and impartial jury, there is no "right" to single-sex higher education; if litigants have no right to insist on the composition of the jury, students have no right to a college "composed of members of a particular race or sex." If the state has no legitimate interest in discriminating on the basis of sex among potential jurors - even if some litigants arguably benefit (because the process may create a more impartial jury), the state can assert no cognizable interest in discriminating on the basis of sex among potential students - even if some students may arguably benefit.

Though the state's asserted interest in *J.E.B.* was plainly valid and designed to enhance a constitutionally protected right, it did not suffice to justify sex discrimination that would perpetuate stereotypes and "reflect and reinforce patterns of historical discrimination." 114 S. Ct. at 1428. The history of peremptory jury challenges belonged to a tradition of exclusion of women -- from jury service, law and civic life generally:

> When state actors...[rely] on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women....[T]hese stereotypes have wreaked injustice in so many other spheres of our country's public life....[S]tereotypes about the group's competence or predispositions...have been used to prevent them from...pursuing their chosen professions, or

> otherwise contributing to civic life.

Id. at 1427 & 1428 n.14. VMI's policy, "driven unchanged since its origins by a stereotyped view of the proper role and capabilities of women in society," *VMI II*, 44 F.3d at 1248 (Phillips, J., dissenting), reflects women's historical exclusion from military academies, many aspects of military service, and a range of job opportunities that incorporated a military-style culture, such as police and corrections officers. *See, e.g., Schlesinger v. Ballard*, 419 U.S. 498 (1975) (noting history of discrimination against women in the military). VMI's policy thus "serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women...." *J.E.B.*, 114 S. Ct. at 1422.

Other invidious stereotypes are reflected in the lower court's conclusion that co-education would lead to "jealousy and resentment," that "deliberate harassment" would affect women in unacceptable ways, and that "cross-sexual confrontation and interaction" would create "additional elements of stress and distraction."[55] Indeed, "one of the most insidious of the old myths about women [is] that women, wittingly or not, are seductive sexual objects...[whose] presence might provoke sexual assault. It is women who are made to pay the price in lost...opportunities." *Dothard v. Rawlinson*, 433 U.S. at 345 (Marshall, J., concurring in part and dissenting in part). This rationale for sex discrimination is also historically familiar:

> Reformers around the turn of the century argued [against] permitting the sexes to work side by side... because [women's] presence tempts men or because corrupt men will exploit innocent and vulnerable women....This concern reflects the belief in women's sexuality as an autonomous

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[55] *VMI I*, 976 F.2d at 896; *see also* 766 F. Supp. at 1435 ("adolescent males benefit from being able to focus exclusively on the work at hand, without the intrusion of any sexual tension").

> force over which neither they nor the men with whom they work have control.[56]

Even if it were true that "cross-sexual...interaction" creates a "distraction," there is no basis to conclude that women should be penalized and their educational opportunities sacrificed to facilitate men's ability to concentrate.

The plan, if approved, would "cure" sex discrimination in admissions to a highly prestigious, well-endowed institution that offers educational opportunities from which women have traditionally been excluded, by continuing to withhold the very benefits sought, and by offering instead access to an all-women's college modeled on conventional behavioral norms for women that is concededly inappropriate for the very women who seek entrance to VMI. VMI's unbroken tradition of discriminating against women, like the "long history" behind sex-based peremptory jury challenges, provides no defense; here, as there, the result is "doctrinally compelled." *J.E.B.*, 114 S. Ct. at 1428 nn. 12, 15

II. THE LOWER COURTS RELIED ON PALPABLY INSUFFICIENT EVIDENCE TO JUSTIFY CONTINUING SEX DISCRIMINATION.

The lower courts' legal conclusions were thus fatally flawed. Even taken at face value, VMI's claim that its policy is based on "scientific" evidence is unavailing. Even if that were not the case, however, this record would provide no basis for an exception to equal protection principles. Much of the testimony on which the lower courts relied is inherently unreliable because of the failure to insure that expert testimony met the standards for admissibility required by Rules 702 and 703 of the Federal Rules of Evidence:

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[56] National Research Council, National Academy of Sciences, *Women's Work, Men's Work: Occupational Segregation on the Job* 40 (Reskin & Hartmann eds., 1986).

> In a case involving scientific evidence, *evidentiary reliability* will be based on *scientific validity*....Faced with a proffer of expert scientific testimony, then, the trial judge must [undertake]...a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and...properly can be applied to the facts at issue.

Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. at 2795 & n.9, 2796. The trial judge observed none of these precautions.

Witnesses who testified at the liability stage about alleged psychological and developmental differences between men and women, had no apparent expertise in the psychology of gender.[57] An expert qualified to testify about exercise physiology and physical education was permitted to offer opinions about women's motivation, aggressiveness, and "fear of failure," without evidence of expertise in these areas.[58] A VMI graduate, a fact witness who pursued a career in the Army, opined that women are more emotional than men and cannot endure stressful situations as well.[59] He possessed no apparent expert qualifications.

Witnesses at the remedy phase commonly cited personal experiences and anecdotal evidence to support generalizations about male and female characteristics. The *voir dire* of Dean Wilson revealed she had no expertise on "the psychology of gender" or the "development of college age women."[60] Over objection, she was accepted as an expert on "student development."[61] She was

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[57] Tr. at 376-78 (Conrad), 686 (Richardson).

[58] *Id.* at 931-40 (Davis). He also expressed opinions as to the relative merits of the skills he attributed to each sex. *See id.* at 939.

[59] *Id.* at 910 (Bissell).

[60] J.A. Vol. II at 588.

[61] *Id.* at 591.

permitted to testify to hearsay and anecdotes about sex-based behavioral and personality characteristics and to express her opinion on their implications for educational programs. Riesman testified that his knowledge of "the fate of women's colleges" derived from meetings with college presidents and from reading press clippings sent to him by a friend.[62]

Elizabeth Fox-Genovese, a historian, was previously director of a women's studies program at a coeducational institution and has never taught at a single-sex college. She has no training in psychology and no apparent expertise with regard to research on single-sex education.[63] She was permitted to testify to a conversation with a Mary Baldwin student, which provided support for her opinion about the remedial plan, although there is no evidence that this student was representative of any particular group. The court rejected the government's objection, stating "this is the way Dr. Fox-Genovese conducts her research by interview....Of course, this is the basis of her opinion. It doesn't necessarily mean what the young woman said is true."[64] There is no evidence that Fox-Genovese does research by interview, that she is trained in this social science research method, or that "the facts or data [on which she relied are] of a type reasonably relied upon by experts in the particular field in forming opinions." Fed.Rules Evid. Rule 703. To the contrary, anecdotal information is considered highly suspect. [65]

The trial court's findings about sex-based differences and

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[62] *Id.* at 696-97.

[63] *Id.* at 550-60. The testimony was general, vague, and largely unsupported; the reference to Valerie Lee's research is inaccurate. *See id.* at 565 and pp. 26-29 *infra*.

[64] *Id.* at 564.

[65] Overgeneralizing from anecdotes is a classic methodological error. *See* Earl Babbie, *The Practice of Social Science Research* 10-11 (4th Ed. 1986).

the value of single-sex education at VMI rest on anecdotes and speculation expounded by witnesses who were not properly qualified as experts and who were permitted to express opinions that were not properly supported.[66] This testimony, often admitted over objection, was used to reach conclusions about psychological and physiological characteristics of males and females and educational methods suitable to those characteristics, and to conclude that college-age males benefit from single-sex education.

Specifically, testimony that males and females develop differently, have different learning styles, and have different psychological and educational needs was a critical building block toward the conclusion that single-sex education is pedagogically justifiable for men. Much of this testimony relied on the research and writing of Carol Gilligan.[67] Gilligan's research and theories were used to support the claim that an educational program geared specifically to meet men's developmental and educational needs is effective and provides unique benefits for both the men who attend and for society at large, and that introducing women into this kind of setting would be counterproductive for women and would

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[66] The trial court relied heavily on both Riesman and Fox-Genovese. *See, e.g., VMI II*, 852 F. Supp. at 480-81. Curiously, the Court discounted the testimony of Alexander Astin, although VMI relied heavily on his work, see J.A. Vol. I at 276-79, 281-83, on the ground that he favors the "elimination of sexism and racism" and believes in the "public-private distinction." 852 F. Supp at 479. The court did not question Fox-Genovese's objectivity, although she "very much admire[s]" Mary Baldwin, J.A. Vol. II at 463; or Tyson's objectivity, although her institution stands to gain financially from the creation of VWIL, 852 F. Supp. at 499; or Bissell's objectivity, although he is a VMI alumnus.

[67] See Defendants' Proposed Findings of Fact and Conclusions of Law ¶235 at 42, ¶248 at 44, ¶286 at 51, *United States v. Commonwealth of Virginia, et al.* (W.D.Va.)(Civ. Action No.90-0126-R) and Defendants' Trial Ex. 73, *Materials Regarding Single-Sex Education*, designated Ex.130A on remand. She was also cited in the testimony of Riesman and Richardson. Blythe McVicker Clinchy, *amica* herein, the co-author of *Women's Ways of Knowing* is also cited.

deprive men of an unique and valuable opportunity. However, nothing in Gilligan's work provides support for these propositions. The fact that she observed certain differences that are associated with (but not caused by) gender also does not support the conclusion that men should be separated from women for educational purposes.

The testimony in this case misconstrues the purpose and import of Gilligan's work, in particular her acclaimed book, *In A Different Voice: Psychological Theory and Women's Development* (1982). There, she addressed a problem she observed in her research on psychological development: that women's descriptions of their experiences and responses to experiences did not conform to descriptions of "normal" human development reflected in classical psychological theory articulated by Freud, Erikson, Piaget, and Kohlberg. While these classical theorists concluded there was something wrong with women, Gilligan concluded that there was something wrong with psychological theory.

According to Gilligan's analysis, classic psychological theory suffered from two flaws. First, the theory attached affirmative value to certain characteristics culturally defined as "masculine," such as separation, detachment, subordination of relationships, and abstract thinking, while ignoring universal human characteristics culturally defined as "feminine," such as attachment and interdependence. Secondly, the theory was premised on incomplete factual data because virtually all of the studies cited in support had been conducted exclusively on males.[68] The research was thus tainted by a fundamental sampling error that rendered its conclusions suspect.

The observations about psychological development patterns that are generally associated with gender in *In a Different Voice* are not based on any premise of inherent differences between the sexes, but on the basis of their different opportunities and

[68] *See, e.g.*, Daniel Offer, *The Psychological World of the Teenager: A Study of 175 Boys* (1969).

experiences. The book states: "the different voice I describe is characterized not by gender but by theme....the contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalization about either sex."[69] There is too much variation within each sex to argue that psychological differences result from "real" differences between the sexes. It is incontrovertible, for example, that qualities such as aggression and empathy are not sex-based -- women can be aggressive and men can be empathetic.

VMI also relied on the work of Valerie Lee.[70] Her research provides scholarly support for the proposition that single-sex education at the secondary school level provides benefits for young *women* on many educational outcomes, including achievement, attitude and behaviors.[71] However, the efficacy of single-sex education is shown in a plethora of studies to be gender-specific and restricted to young women. These studies speculate that a cause for their findings is that females experience forms of discrimination in education that males do not experience.[72] Single-sex education thus benefits females, who choose it, since in these

[69] Gilligan, *In a Different Voice, supra*, at 2.

[70] J.A. Vol. II, pp. 298-99, Defendants' Ex. 130A contains references to Lee's work. Fox-Genovese also cited Lee ("schools such as Mary Baldwin make their greatest contribution to students who are less than very [affluent],...they do introduce them to ambition ....This is borne out by...Valerie Lee and her coworkers..."). J.A. Vol. II at 565.

[71] *See* Anthony Bryk, Valerie Lee & P.B. Holland, *Catholic Schools and the Common Good* 225-41 (1993); Lee & Bryk, *Effects of Single-Sex Secondary Schools on Student Achievement and Attitudes*, 78 J.Educ.Psych. 381 (1986); Valerie Lee & Helen Marks, *Sustained Effects of the Single-Sex Secondary School Experience on Attitudes, Behaviors, and Values in College*, 82 J. Educ. Psych. 578 (1990).

[72] Valerie Lee, et al., *Sexism in Single-Sex and Coeducational Independent Secondary School Classroom*, 67 Sociol. of Educ. 97 (1994).

settings this gender-specific disadvantage is reduced or eliminated. Programs for young women succeed for reasons that do not apply to men. [73]

These data provide no support for the efficacy of single-sex education for young men. In fact, the very studies that demonstrate a positive effect for women fail to show such an effect for men; they find no statistically significant or consistent difference between males with single-sex and coeducational experience in terms of achievement, attitude or behavior. Thus, "...the classroom effects for male and female students are quite different. Coeducational classrooms appear to enhance male achievement, whereas single-sex classrooms appear to enhance female achievement."[74] Not only is there an absence of data to support the conclusion that single-sex education benefits males, some studies even demonstrate a negative effect. In a recent observational study on gender bias in education, Lee documents both a higher incidence of sexism in all-male settings and fewer occasions in which instances of equity were observed.[75] In a report on single-sex education prepared by the Department of Education, Lee reviewed the principal findings from that study: "the most serious incidents of sexism we observed were in all-boys' classes with male teachers....we saw females regarded as sex objects, both in writing, in classroom displays, and in class discussion." She concludes that the "research did not indicate that, in general, all-male environments were especially healthy ones for

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[73] As a legal matter, programs designed for women and girls are justifiable, if at all, on the ground that they counteract the consequences of the discrimination many females still experience. *See* Lani Guinier, Michelle Fine and Jane Balin, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. Pa. L. Rev. 1 (1994).

[74] Emanuel Jimenez & Marlaine Lockheed, *Enhancing Girls Education Through Single-Sex Education: Evidence and a Policy Conundrum*, 11 Educ. Eval. and Policy Anal. 117, 125 (1989).

[75] Lee, *supra*.

adolescents in terms of sex equity."[76]

Advocates of single-sex education concede that the results of studies on the effects of single-sex education for men "are generally null or negative."[77] Other scholars contend that their research demonstrates that coeducation provides greater benefits to students of *both* sexes than does single-sex education.[78] On both sides of the professional debate about the relative merits of single-sex versus coeducation for young *women*, experts concede the absence of data demonstrating the efficacy of single-sex education for *men*: "The data are consistent with the conclusion that ....most productive [colleges] for men are coeducational."[79]

The fact that positive outcomes are sometimes associated with single-sex education does not establish single-sex as the cause of those outcomes. Lee identifies other structural and organizational characteristics of girls' schools that may account for their success, rather than gender homogeneity *per se*. These characteristics include "communal school organization [which] has powerful positive effect on the engagement and commitment of

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[76] Valerie Lee, *Single-Sex Schooling: What Is the Issue?*, *in* U.S. Dept. of Educ. *Single-Sex Schooling: Proponents Speak* 43-44 (1993).

[77] Cornelius Riordan, *The Case for Single-Sex Schools*, in U.S. Dept. of Educ. *Single-Sex Schooling: Proponents Speak* 48 (1993). Riordan contends, however, that the data apply only to males who are part of the majority culture, not to minority males.

[78] Herbert Marsh, *Public, Catholic Single-Sex, and Catholic Coeducational High Schools: Their Effects on Achievement, Affect, and Behaviors*, 81 J. Educ. Psych. 320 (1989).

[79] M. Elizabeth Tidball, *Educational Environments and the Development of Talent*, U.S. Dept. of Educ., *Single-Sex Schooling: Proponents Speak* 58 (1993). Even the trial court concluded that "coeducation [would provide] a better training program from the perspective of the armed forces, because it would provide training dealing with a mixed-gender army." 766 F. Supp. at 1441.

students and teachers" and smaller size, "which helps foster a communal environment."[80] Alexander Astin, author of *Four Critical Years: Effects of College on Beliefs, Attitudes, and Knowledge* (1977), observes that the "admission of women by colleges that formerly admitted only men has not substantially altered their unique effects on student development ....Therefore, I must conclude that it was not single sex status *per se* that yielded the positive effects observed for single sex colleges for men....."[81]

The record and the professional literature fail to support VMI's claim that any educational success is attributable to its single-sex environment, as opposed to the quality of its facilities, its faculty-student ratio or other factors. VMI's claim that discrimination is "scientifically" justifiable is contested by some of the very experts VMI cites. Its reliance on unsupported theories about purported sex-based differences and hypothetical "average" women cannot conceal the fact that real women are as qualified to attend VMI as the men who have for so long enjoyed exclusive access.

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[80] Lee, *What Is the Issue? supra*, at 42-43.

[81] Johnson v. Jones (D.S.C.) (Civ. Action No. 2:92-1674-2) (Affidavit dated January 8, 1993 at p. 6, ¶12).

CONCLUSION

Wherefore, *amici* respectfully request that the Court hold that VMI's policy of excluding women violates the Equal Protection Clause.

Respectfully submitted,

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* Admission pending in New York.

** Counsel acknowledges with gratitude the contributions of Maria Claudia Escobar, a student at Columbia University School of Public Health and Ona T. Wang, a student at New York University Law School in the preparation of this brief. Dianne Avery, Professor of Law at State University of New York at Buffalo generously shared her manuscript, *Institutional Myths, Historical Narratives, and Social Science Evidence: Reading the 'Record' in the Virginia Military Institute Case*, 5 S. Cal. Rev. L. & Women's Stud. (forthcoming Spring 1996) (on file with counsel), which provided valuable insights and information.

APPENDIX

The American Association of University Professors (AAUP) is a national membership organization of more that 44,000 faculty members and research scholars in all academic disciplines. Founded in 1915, AAUP develops recommended policy standards to advance academic freedom, tenure, nondiscrimination, and other important values in American colleges and universities. The availability of full opportunities for female faculty and students is a major goal of the association.

The Center for Women Policy Studies is an independent feminist policy research and advocacy institution founded in 1972. Throughout its history, the Center has concentrated on complex and cutting edge women's issues. The Center's Education Equity Policy Studies program has produced landmark research on sex bias in the SAT and founded the bias in Testing Task Force of the National Coalition for Women and Girls in Education. The Center has also demonstrated its commitment to intergenerational partnerships among women and to the development of leadership among young women by offering opportunities and encouraging leadership in policy arena, feminist issues, and in constructing strategies for institutional change. The Center also formed a partnership with the Wider Opportunities for Women and the American Council on Education to bring low income women into higher education.

The Program on Gender, Science and Law is a multi-disciplinary policy program situated at the Columbia University School of Public Health and staffed by members of the Faculty of Medicine of Columbia University. One of its missions is to examine how scientific information and theories about gender are applied in legal contexts and to evaluate the sufficiency of scientific evidence about gender that will influence the legal rights of men and women. Among other things, the Program provides expert testimony to legislatures, provides information and analysis to governmental officials and others, and submits briefs on relevant cases in federal and state courts. Recently, the Program submitted an *amicus* brief in the Supreme Court in *Daubert v. Merrell Dow*

Pharmaceuticals, 113 S.Ct. 2786 (1993), on standards for the admissibility of expert testimony in federal courts.

Stanley Aronowitz, Ph.D., is a Professor of Sociology at the City University of New York Graduate Center. He has founded 3 Public Alternative High Schools and written innumerable articles on issues of learning curricula. He is, in addition, the author of 12 books, two of which concern the educational system: *Education Under Siege* (with Henry Jereux) and *Postmodern Education*.

Stephanie J. Bird, Ph.D., a neuroscientist, is Special Assistant to the Provost of the Massachusetts Institute of Technology. She is a former President of the Association for Women in Science (AWIS), Principal Investigator and Project Director of the AWIS Mentoring Project, recipient of the Mellon Fellowship in the Science, Technology and Society Program at M.I.T. and a Visiting Scholar at the Hastings Center Institute of Society, Ethics and the Life Sciences. She is co-editor of the journal *Science and Engineering Ethics* and the author of numerous professional publications.

Patricia Campbell, Ph.D., for the past fifteen years has directed Campbell-Kibler Associates, an educational consulting firm specializing in educational research and evaluation with an emphasis on science and math education and issues of gender and ethnicity. She has received numerous awards for educational research and journalism. She assisted in designing the National Institute of Education's Program to encourage women and minorities to become educational researchers. She has been an ongoing reviewer for various National Science Foundation programs including summer science camps and women and girls' programs. She has authored over eighty books, chapters, and articles which include: *Redefining the 'Girl Problem' in Mathematics* in *New Direction for Equity*; *Gender and Mathematics Research, NCRMSE Research Review*; and *Gender Equity: The Unexamined Basic of School Reform* in *Stanford Law and Policy Review*. She serves as an editor or reviewer on six professional journals and has served on various committees of the American

Educational Research Association including the Committee on Guidelines for Eliminating Bias in Research and the Committee on Special Interest Groups. She has been an expert witness for the plaintiff in the sex discrimination case against The Citadel, an all-male, state supported college in South Carolina.

Blythe McVicker Clinchy, Ph.D., is a Professor of Psychology at Wellesley College. She has studied the educational and cognitive development of college women under grants form the U.S. Department of Education, the Carnegie Foundation and the Spencer Foundation. She is the co-author of *Women's Ways of Knowing*, (1986) (cited by Respondents in this case), and is currently co-editing *Women's Ways of Knowing Revisited* and *Essential Papers in Gender and Psychology*. She has served on the board of several professional journals and numerous associations including the Center for Research on Women, the Association of American Colleges and the National Conference on Education for Women's Development.

Mary Crawford, Ph.D., is Professor of Psychology and Women's Studies at West Chester University of Pennsylvania. She held the Jane W. Irwin Chair in Women's Studies at Hamilton College, served as Distinguished Visiting Teacher/Scholar at Trenton State College, and directed the graduate program in women's studies at the University of South Carolina. She has written extensively on the psychology of sex differences and issues associated with scientific measurement. Her publications include the books *Gender and Thought*, (1989); *Talking Difference: On Gender and Language*, (1995); and *Women and Gender: A Feminist Psychology*, (1992). She is the author of numerous professional articles and serves on the editorial boards of three journals dealing with gender and psychology. In the capacity of Research Director for the Women's College Coalition, she helped implement a three year research project on optimum educational environments for women. She is active in the Division on the Psychology of Women of the American Psychological Association as well as many regional and national groups concerned with gender equity.

Faye J. Crosby, Ph.D., is Professor of Psychology at Smith College. She held the first Adeline Barry Davee Chair at the J.L. Kellogg Graduate School of Management and was the William P. Huffman scholar in residence at Miami University. She has also been awarded the Yale College Prize for Distinguished Undergraduate Teaching and the Smith College Award for Excellence and Dedication in Teaching. She is an expert on gender issues and psychology and has served on the review boards of five professional journals, is a member of numerous professional societies and has been a member of the Council of the Society for the Psychological Study of Social Issues and is an ad hoc reviewer for the American Psychological Association and the National Science Foundation. She has co-authored and edited over 80 books and articles.

Kay Deaux, Ph.D., is Distinguished Professor in Psychology at City University of New York Graduate Center. She has a twenty five year history of research and writing about gender issues. She has served in an advisory capacity to the National Science Foundation, the National Institute of Mental Health, the Woodrow Wilson Foundation, and Princeton University's Women's Studies Program. She is on the editorial board of 12 professional journals and the American Psychological Association's *Encyclopedia of Psychology*. Her books include *The Behavior of Women and Men*, one of the first books to define the area of gender and social psychology, and *Women of Steel*, a study of women in blue-collar jobs. She is the recipient of several National Science Foundation grants. Her empirical research includes studies of gender stereotypes, attributions and causal explanations for performance, gender identity, and general patterns of gender-related behavior.

Cynthia Fuchs Epstein, Ph.D., is Distinguished Professor of Sociology at the City University of New York Graduate Center. She has held a Guggenheim Fellowship, was a Fellow of the Center for Advanced study in Behavioral Sciences at Stanford, Resident Scholar at the Russell Sage Foundation and served as the co-director of the Program on Sex Roles and Social Change at Columbia University. She has also served as a consultant to the

White House under two administrations. She has written extensively on her research on women in professions, business, and politics. Her publication *Women in Law* received the SCRIBE's Book Award and the Merit Award of the American Bar Association. She also authored *Deceptive Distinctions: Sex, Gender and the Social Order* in which she analyzes changing paradigms in the social sciences with regard to sex differences and similarities. She has been an expert witness for the plaintiff in the sex discrimination case against The Citadel, an all-male, state supported college in South Carolina.

Michelle Fine, Ph.D., is Professor of Psychology at City University of New York Graduate Center. She has been the recipient of numerous awards for distinction in teaching, research, and service. She has been the Principal Investigator on many research projects addressing gender issues, education and adolescence. She received the Janet Helms Distinguished Scholar award from the Teacher's College of Columbia University in 1994, the American Educational Studies Association Critic's Choice Award for her book *Disruptive Voices: The Possibilities of Feminist Research*, and numerous other awards. She is author, co-author, or editor of approximately 90 books, chapters, and articles. She currently serves as a consultant for the New Vision Schools in New York City and is a board member of Pew Forum on Educational Reform and the National Center for Restructuring Education, Schools and Teaching. She has been an expert witness for the plaintiff in the sex discrimination case against The Citadel, an all-male, state supported college in South Carolina.

Carol Gilligan, Ph.D., is Professor of Human Development and Psychology at Harvard University, Graduate School of Education. Her areas of specialty include human development, psychology of adolescence, psychology of women, identity development, and moral development and education. She received an M.A. from Radcliffe College, a Ph.D. from Harvard University, and honorary degrees from Regis College, Swarthmore College, Haverford College, and Wesleyan University. She is the recipient of numerous prizes, awards, and honors. She serves on the boards of ten professional journals, has served as principal

investigator on fourteen research projects, and has authored more than eighteen professional publications. Her book, *In A Different Voice: Psychological Theory and Women's Development* has been translated into nine foreign languages. Her research and theories were cited extensively by witnesses for VMI in support of its efforts to maintain its single-sex status. This use of her research distorts its findings, and she repudiates the conclusions drawn by VMI in this case.

Mary S. Henifin, M.P.H., J.D., is an Adjunct Assistant Professor of Public Health Law at Robert Wood Johnson Medical School. She is editor for Public Policy and Law for the journal *Women and Health* and also is editor of the journal *Trends in Medicine, Law, and Ethics*. She has lectured and written extensively on scientific issues as they affect women and was co-editor of the pioneering book *Biological Women: The Convenient Myth* (1981).

Ruth Hubbard, Ph.D., is Professor Emerita of Biology at Harvard University. She has received honorary degrees from universities in the United States and Canada and has also received awards including the Distinguished Service award from the American Institute of Biological Sciences. She is the editor of five collections of writings about gender and science. She has authored more than 150 articles in books, professional journals, and popular magazines including *The Politics of Women's Biology*, (1990) and *Explaining the Gene Myth*, (1993). She served in an advisory capacity to many scientific organizations including the Board of Trustee's of the Woods Hole Marine Biological Laboratory where she is now a Trustee Emerita. She also serves on the Board of Directors of Science for the People and on the editorial board of Women and Health.

Vilma Hunt, B.D.S., M.A., has served as a member of the Environmental Protection Agency's Science Advisory Board and is currently a consultant in environmental and occupational health, having worked in the United States, Canada, Europe, and Asia. She is an adjunct faculty member at the University of Massachusetts at Lowell, has served as Visiting Lecturer at

Harvard School of Public Health, as Professor of Environmental Health at Pennsylvania State University, and as Assistant Professor of Environmental Health at Yale University School of Medicine. She has also held visiting faculty positions at various other universities in the United States and Asia. She has been the recipient of several honors and awards, including the National Endowment for the Humanities Award. She has authored the influential book *Work and the Health of Women* (1979) as well as over twenty-five other articles, chapters, and books, several of which focus on the environmental hazards experienced by women in the workplace.

Anne S. Kasper, Ph.D., is an Adjunct Assistant Professor at the Center for Research on Women and Gender at the University of Illinois at Chicago, where she is also the recipient of the Center's Women's Health Policy Research Fellowship. She has been an advocate, journalist, researcher and public policy specialist on women's health for more than 20 years, and was health editor of *New Directions for Women*, and editor of the journal *Women & Health*. As the first co-chair of the National Women's Health Network, she was instrumental in gaining national attention for women's health issues. Most recently, she directed the Campaign for Women's health, a coalition of more than 100 national, state, and grassroots organizations convened to set and promote an agenda for women's health in health care reform.

Penelope Kegel-Flom, Ph.D., is Associate Professor at the University of Houston College of Optometry and currently serves as President of the national Association for Women in Science (AWIS), where she has developed a national leadership development program for women in science. AWIS is the largest multi-disciplinary science organization for women in the United States, and is committed to the achievement of equity and full participation of women in all areas of science and technology. She has taught courses and workshops on leadership for women and men, and has recently developed a course entitled, "Women's Health: New Perspectives." She received an outstanding faculty award from the City of Houston in 1992 and was honored as a Woman of Excellence by the Federation of Houston Professional

Women in 1994. She was the AWIS delegate to the Non-Governmental Forum and the Fourth U.N. World Conference on Women in Beijing in China. Dr. Kegel-Flom is the also the author of numerous articles in scientific journals, which focus primarily on the personality dimensions of leadership, leadership among women scientists, and prediction of performance in the health professions.

Evelyn Fox Keller, Ph.D., is a Professor in the Program in Science, Technology and Society at M.I.T., and has held professorial positions at U.C. Berkeley, Princeton, Cornell, and Northeastern University. A recipient of numerous awards and honorary doctorates, including the prestigious MacArthur fellowship, Dr. Fox Keller has published several books dealing with gender and science, including *Reflections on Gender and Science*, at Yale University Press (1985), which has been translated into German, Italian, Japanese, Dutch, and Finnish. Her most recent work, *Refiguring Life: Metaphors of Twentieth Century Biology*, was published by Columbia University Press in 1995.

Valerie E. Lee, Ed.D., is Associate Professor of Education at the University of Michigan. She received her doctorate from Harvard University and specializes in research, measurement and evaluation of educational programs and in the sociology of education. She is the author of more than 50 professional articles, most of which appear in peer reviewed professional journals and many of which address the efficacy of single-sex education. She has received numerous awards and recognition for her work, including awards from the American Sociological Association, American Academy of Education, United States Department of Education, and Rockefeller Foundation. She has directed approximately twenty research studies, serves on the editorial and review boards of 15 professional journals, and has served as an advisor to private and public entities on a wide variety of educational topics, including but not limited to single-sex education. Though defendants cited Dr. Lee's research in defense of the position that single-sex education at VMI is pedagogically justifiable, their use of the material distorted Dr. Lee's research, and Dr. Lee repudiates the conclusions VMI has drawn.

Zella Luria, Ph.D., is Professor of Psychology and American Studies at Tufts University. She has, in addition, held a visiting professorship in Clinical Psychology at the University of Florida at Gainesville, as well as visiting professorships in Developmental Psychology at UCLA and the University of Michigan. She has practiced as a licensed clinical psychologist in Massachusetts, has been elected Fellow of the Developmental Division of the American Psychological Association, charter Fellow of the American Psychological Society, and President of the New England Psychological Association. For the past 25 years, she has conducted extensive research in sex, gender, and sexuality, and has received support from The Ford Foundation, The Mellon Foundation, and the U.S. Public Health Service, among others. She has authored several articles, and is the senior author of two volumes on human sexuality. She has a book due out from Harvard University Press in 1997, entitled *Sex and Gender: A Psychological View*.

Maureen Paul, M.D., M.P.H., is Associate Professor in the Departments of Obstetrics and Gynecology and Family and Community Medicine at the University of Massachusetts Medical School, Director of the Occupational and Environmental Reproductive Hazards Program at the University of Massachusetts Medical Center, and visiting lecturer at the Harvard University School of Public Health. She has been invited to present her research and conclusions before over 50 organizations, including the Australasian College of Physicians and Surgeons (as keynote speaker), the Massachusetts Bar Association, and the U.S. Navy, Division of Occupational Health and Preventive Medicine. She has served on several advisory boards and boards of directors, and is a fellow of the American College of Obstetricians and Gynecologists. She is, in addition, a member of various professional health organizations and the recipient of the American Medical Women's Association Reproductive Health Award.

Diane S. Pollard, Ph.D., is Professor of Educational Psychology at the University of Wisconsin - Milwaukee. She received her doctorate in education from the University of Chicago. Her research, which has been supported by the federal

government and private entities, focuses on gender and race and their implications for educational achievement, educational policy, and school programs. She has authored more than 20 publications, many of which appear in peer-reviewed professional journals. She has presented numerous papers at professional meetings and works actively with professional societies on issues related to educational policy and programs for women and African-Americans.

Susan Reverby, Ph.D., is Luella LaMer Professor for Women's Studies at Wellesley College. She has held various prestigious teaching positions, including the W.E.B. Du Bois Fellowship at Harvard University and a place as Visiting Scholar at University of Pennsylvania School of Nursing. She has published over 40 articles, chapters, and books that explore the social context of gender roles, including her most recent (with Dorothy O. Helly), at Cornell University Press, entitled *Gendered Domains: Beyond the Public-Private in Women's History* (1992).

Jo Sanders, Research Professor at the College of Education, University of Washington, has directed nationwide projects on gender equity in science, technology, and mathematics education and careers since 1979. She has spearheaded projects dealing with gender equity in math, science, and technology education, and is currently the Principal Investigator in the three-year Teacher Education Equity Project, for which NSF, IBM, Hewlett Packard and AT&T are funding 60 professors of science, mathematics and technology, in 38 colleges and 26 states, to develop materials on gender equity. The recipient of the 1992 American Educational Research Association's Women Educators Curriculum Award, she has written numerous books, chapters, and articles on gender equity in technology, science and mathematics. Her most recent publication is *Lifting the Barriers: 600 Tested Strategies that Really Work to Increase Girls' Participation in Science, Mathematics and Computers* (1994).

Bernice Sandler, Ed.D., is a Senior Scholar in Residence at the National Association for Women in Education. Dr. Sandler writes and consults with colleges and universities on the subject of achieving equity for women on campus. In addition to receiving

numerous awards and nine honorary degrees, she has authored more than 60 articles and has given more than 1700 presentations around the country on sex discrimination in education. Nationally recognized for her expertise in educational policy and programs, Dr. Sandler was a principal drafter of Title IX of the Education Amendments of 1972, and has testified thirteen times before the United States Congress on gender equity issues in education. Dr. Sandler was appointed by Presidents Ford and Carter to the National Council on Women's Educational Programs, and formerly served as Chair of that Council.

Ellen Wahl, a senior scientist with Education Development Center, Inc., is currently involved in major projects, supported by the National Science Foundation, to increase access and participation in math, science, and technology for girls and women, people of color, and people with disabilities. For ten years prior to this, Ms. Wahl worked with Girls Incorporated, a research program and advocacy youth organization dedicated to helping girls grow up "strong, smart, and bold," and for five years served as the founding director, and then national Director, of Operation SMART, a program to encourage girls' participation in math and science. She is a Research Associate of the Center for Policy Research, and has worked for more than 20 years in program development, applied research, and policy analysis. She has been a reviewer and review panelist for NSF for Informal Science Education, Girls and Women, and Summer Science Camps, and serves on several advisory boards, as well as on the board of directors of Educational Equity Concepts, the steering committee of the Alliance for Mainstreaming Youth with Disabilities, and the national council of Science Linkages in the Community, a project of the American Association for the Advancement of Science.

Leslie Wolfe, Ph.D., is President of the Center for Women Policy Studies, a Washington-based national feminist policy research and advocacy organization. Under her direction, the Center has developed programs such as the Educational Equity Policy Studies and Economic Opportunities for Low Income Women Program. She came to the Center for Women Policy

Studies from a position as Director of Project on Equal Education Rights and from another as Director of the Women's Educational Equity Act Program at the U.S. Department of Education. She also has served as Deputy Director of the Women's Rights Program in the U.S. Commission on Civil Rights and as Special Assistant to the Assistant Secretary for Education in the (former) Department of Health, Education, and Welfare. She currently serves on several boards, including the Montgomery County (MD) Commission for Women and the Policy Advisory Board of the Disability Rights Education and Defense Fund. She has also served as Chair of the National Coalition for Women and Girls in Education, and as a board member of the National Council for Research on Women. She has contributed numerous publications to the study of women's roles, including *'Like She Owns the Earth': Women and Sports* (1985), *Women, Work, and School: Occupational Segregation and the Role of Education* (ed., 1990), and *Feminism Lives: Building a Multicultural Women's Movement in the United States* (1995).

No. 94-1941 (12)

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL WOMEN' S LAW CENTER AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER
(Additional *Amici* Listed Inside Cover)

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INTERESTS OF *AMICI*

Amici curiae are organizations strongly committed to achieving equity for women and have a demonstrated interest in assuring the sound interpretation of the protections guaranteed by the Fourteenth Amendment. Descriptions of the individual organizations are set forth in the attached appendix.[1]

INTRODUCTION

Virginia for 150 years has offered men a benefit it denies women -- the opportunity to pursue an education at VMI. Virginia began excluding women from VMI when it founded the college in 1839 -- a time when Virginia considered African-American slaves to be property and subjected married women to the total control of their husbands. Despite vast changes in the status of women, Virginia's exclusion of women from VMI has "unquestionably been driven unchanged since its origins by a stereotyped view of the proper role and capabilities of women in society." A. 44a-45a (Phillips, J., dissenting). Virginia's creation of a gender-stereotyped, separate and inferior program for women -- the Virginia Women's Institute for Leadership ("VWIL") at Mary Baldwin College -- cannot begin to remedy the constitutional

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[1] The parties' written consent to the filing of this brief has been filed with the Court.

deprivations of rights caused by the exclusion of women from VMI.

SUMMARY OF ARGUMENT

This Court has left open the question whether governmental classifications based on sex warrant strict scrutiny under the Equal Protection Clause. The time has come to decide that strict scrutiny applies.

The standard of intermediate scrutiny for gender classifications has proved an unworkable half-measure. To be sure, Virginia's separate but unequal educational program for women falls far short of satisfying the test of intermediate scrutiny. Nevertheless, the courts below found intermediate scrutiny sufficiently malleable to uphold Virginia's discrimination against women based on regressive gender stereotypes. Despite this Court's repeated efforts to strengthen the standard of intermediate scrutiny, the standard has yielded incorrect and inconsistent results in the lower courts, and generated frequent complaints about the lack of guidance it affords.

In addition, after Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (plurality opinion), continued application of intermediate scrutiny creates a serious anomaly in equal protection jurisprudence. White men receive greater constitutional protection from race-conscious affirmative action plans, however benignly

intended, than women receive from sex discrimination. And, in the policy arena, distinctions between the standard of review for race and gender-based classifications often blur, causing women to be more easily discriminated against than to benefit from programs designed to overcome such discrimination. The need to clarify and harmonize the Court's prior decisions provides good cause to rule now that strict scrutiny is the proper standard of review for classifications based on gender.

The Court has identified several warning signs that indicate that a particular classification is suspect and therefore warrants strict scrutiny. One factor supporting the application of strict scrutiny to gender-based classifications is that gender is an immutable characteristic unrelated to ability, and therefore such classifications are likely to reflect harmful stereotypes that continue to disadvantage women. Second, strict scrutiny is appropriate because women have suffered from a long -- and continuing -- history of discrimination. Third, women remain severely underrepresented in the political process, and lack the power necessary to prevent sex-based discrimination like that at issue here.

The fact that women constitute a numerical majority in this country is no argument against strict scrutiny. As the historical record reflects, the percentage of women in the population has never prevented discrimination against them. Moreover, under Adarand and Croson, strict scrutiny applies to race-based classifications that purportedly discriminate

against whites, a majority group. Further, under Adarand, strict scrutiny is not fatal in fact for such classifications, nor should it be for sex-based classifications designed to remedy discrimination against women.

In short, the Court should direct now, once and for all, that courts strictly scrutinize governmental classifications based on gender.

ARGUMENT

I. ALTHOUGH THE EXCLUSION OF WOMEN FROM VMI FAILS TO WITHSTAND INTERMEDIATE SCRUTINY, THIS COURT SHOULD DECIDE NOW THAT GENDER-BASED CLASSIFICATIONS MUST BE SUBJECT TO STRICT SCRUTINY

The brief for the United States sets forth persuasively why the separate but unequal program at VWIL cannot withstand the intermediate scrutiny this Court has applied in cases such as J.E.B. v. Alabama, 114 S. Ct. 1419 (1994), and Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).[2] Amici agree with the government's arguments and do not reiterate them here. Rather, amici urge that the Court take this opportunity in this case to hold that sex is a suspect class under the Equal Protection Clause -- a question

[2] Because the exclusion of women from VMI cannot withstand intermediate scrutiny, it necessarily cannot survive strict scrutiny.

this Court has repeatedly left open. See J.E.B., 114 S. Ct. at 1426 n.6.; Hogan, 458 U.S. at 724 n.9; Harris v. Forklift Sys., 114 S. Ct. 367, 373 (1993) (Ginsburg, J., concurring); Stanton v. Stanton, 421 U.S. 7, 13 (1975). The Court should hold now that governmental classifications based on gender must withstand strict scrutiny.

That intermediate scrutiny yields the right result in this case is not a good reason to continue to apply it. To the contrary, there are compelling reasons why the Court should now announce that strict scrutiny applies. In particular, there is a need to eliminate confusion in the lower courts, and to resolve serious inconsistencies in the law resulting from this Court's decisions in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (plurality opinion).

When presented with such good cause to decide a constitutional issue, this Court has not stayed its hand. See, e.g., Teague v. Lane, 489 U.S. 288, 300 (1989) (reaching issue of retroactivity because of need "to clarify the question"). See also Illinois v. Gates, 462 U.S. 213, 230 (1983) (replacing the two-pronged, probable-cause test with the totality-of-the-circumstances test although the same result would obtain); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (holding that the Supreme Court could issue mandamus although such determination was unnecessary).

A. The Intermediate Scrutiny Standard Has Proven To Be Unworkable As Applied to Gender-Based Classifications

There is serious confusion among the lower courts regarding the application of intermediate scrutiny to governmental classifications based on sex. The standard requires a court to determine whether the government can offer an "exceedingly persuasive justification" for a gender classification and to evaluate whether the classification serves "'important governmental objectives and [whether] the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" Hogan, 458 U.S. at 724 (quoting Wengler v. Druggists Mut. Ins. Cos., 466 U.S. 142, 150 (1980)).

Despite decisions of this Court strengthening the intermediate scrutiny standard, lower courts have had great difficulty assessing the importance of governmental interests and in calibrating whether the fit between the classification and the government's purpose is "substantially related."[3] The lower courts have complained repeatedly that the standard provides little guidance for decisionmaking. See, e.g., Lamprecht v. FCC, 958 F.2d 382, 398 n.9 (D.C. Cir. 1992) (referring to intermediate scrutiny as indeterminate); Coral Constr. Co. v. King County, 941 F.2d 910, 931 (9th Cir. 1991) ("[w]e are cognizant of the problems with intermediate scrutiny"), cert. denied, 502 U.S. 1033 (1992); Associated Gen. Contractors of Cal., Inc. v. City and County of San Francisco, 813 F.2d 922, 939 (9th Cir. 1987) ("[intermediate scrutiny] provides 'relatively little guidance in individual cases'") (citation omitted); Meloon v. Helgemoe, 564 F.2d 602, 604 (1st Cir. 1977) (calling intermediate scrutiny "hardly a precise standard"), cert. denied, 436 U.S. 950 (1978); Contractors Ass'n of E. Pa. v. City of Philadelphia, 735 F. Supp. 1274, 1303 (E.D. Pa. 1990) (asserting that intermediate scrutiny provides little guidance to courts in decision making); Joseph v. City of Birmingham, 510 F. Supp. 1319, 1335 n.22 (E.D. Mich. 1981) ("[intermediate scrutiny does] not provide definite guidance . . . decisions may appear inconsistent and unprincipled"). Commentators echo the courts' complaints.[4]

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[3] Cf. J.E.B. v. Alabama, 114 S. Ct. at 1433 (Kennedy, J., concurring) ("the intermediate scrutiny test" does not "provide a very clear standard in all instances").

[4] See, e.g., Maureen B. Cavanaugh, Towards a New Equal Protection: Two Kinds of Equality, 12 Law & Ineq. J. 381, 382 (1994) (criticizing "the Court's ad hoc, and hence variable, analysis as applied to equal protection challenges to gender-based discrimination"); 3 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 18.23, at 277 (2d ed. 1992) ("The Court's decisions appear to be ad hoc judgments based upon Justices' perceptions of the gender classification at issue in each case."); E.A. Hull, Sex Discrimination and the Equal Protection Clause: An Analysis of Kahn v. Shevin and Orr v. Orr, 30 Syracuse L. Rev. 639, 671 (1979) ("the middle tier has no predictable application. Whether or not a given classification furthers an 'important governmental interest,' or is 'substantially related' to this interest, are subjective determinations, and a conservative majority is as likely to conclude one way as a liberal majority is to conclude the

In practice, the intermediate scrutiny standard has produced erroneous, confused, and inconsistent results in the lower courts. The decision below -- which relies on a wholly new construction of intermediate scrutiny to embrace gender-based stereotypes and uphold the denial of equal opportunity to women -- exemplifies such confusion. The court of appeals misapplied intermediate scrutiny to sustain all but "pernicious" governmental classifications based on gender, essentially transforming the standard into the minimal rational basis test. A. 22a. Strict scrutiny is not so easily susceptible to misunderstanding. See Rotunda and Nowak, supra note 4, § 18.23, at 286-87 (strict scrutiny "would limit the ability of individual judges to argue for the legitimacy of gender classifications based upon their personal perceptions of the reasonableness of allocating rights by gender").

Other lower court opinions also demonstrate how the intermediate standard of review has been manipulated. For example, Faulkner v. Jones, 51 F.3d 440 (4th Cir. 1995), cert. denied, __ S. Ct. __, 1995 WL 500529 (Oct. 10, 1995), left open the possibility that South Carolina may be permitted to deny women a Citadel education by operating an alternative, inferior leadership training program for women. See id. at 450 (Hall, J., concurring) ("I am convinced that we have embarked on a path that will

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other"); Note, Equal Protection and the "Middle-Tier": The Impact on Women and Illegitimates, 54 Notre Dame L. Rev. 303, 321 (1978) (noting the highly subjective nature of the inquiry and the "confusion and inconsistency generated" by the intermediate scrutiny standard).

inevitably fall short of providing women their deserved equal access to important avenues of power and responsibility.").

In other cases, lower courts have reached clearly incorrect results applying intermediate scrutiny. For example, before this Court decided J.E.B., numerous courts upheld gender-based peremptory strikes based on traditional and overbroad stereotypes. See United States v. Nichols, 937 F.2d 1257, 1262-64 (7th Cir. 1991); United States v. Broussard, 987 F.2d 215, 218-20 (5th Cir. 1993); State v. Culver, 444 N.W.2d 662 (Neb. 1989). See also Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880 (3d Cir. 1976) (holding that the exclusion of girls from an all-male high school would survive both rational basis and substantial relationship reviews despite the fact that the all-male school had a superior science program), aff'd without op., 430 U.S. 703 (1977) (equally divided Court).[5]

The intermediate scrutiny standard has also produced conflicting results in similar cases. Lower courts have applied intermediate scrutiny to reach different results regarding:

- the constitutionality of rape statutes punishing only male rapists who attack female victims, compare

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[5] Notably, a Pennsylvania court reached an opposite conclusion in a later challenge to the same school system under both the Equal Protection Clause and the state equal rights amendment. Newberg v. School Dist. of Pa., slip op. at 46 (Pa. Ct. of C.P., Philadelphia County, Aug. 30, 1983), aff'd, 478 A.2d 1352 (Pa. Super. Ct. 1984).

Country v. Parratt, 684 F.2d 588 (8th Cir.) (upholding statute), cert. denied, 459 U.S. 1043 (1982), Moore v. Cowan, 560 F.2d 1298 (6th Cir. 1977) (same), cert. denied, 435 U.S. 929 (1978), Rodriguez v. Harris, 496 F. Supp. 116 (S.D.N.Y. 1980) (same), and Eberhart v. State, 727 P.2d 1374 (Okla. Crim. App. 1986) (same), with People v. Liberta, 474 N.E.2d 567 (N.Y. 1984) (striking down statute), cert. denied, 471 U.S. 1020 (1985);

- the constitutionality of criminal statutes distinguishing between male and female defendants who commit the same crime, compare State v. Gurganus, 250 S.E.2d 668 (N.C. Ct. App. 1979) (upholding assault statute penalizing males more heavily than females when the victim is a female) and State v. Ware, 418 A.2d 1 (R.I. 1980) (same) with Tatro v. State, 372 So. 2d 283 (Miss. 1979) (striking down statute prohibiting males but not females from sexually assaulting a child less than fourteen years old);

- the constitutionality of statutes permitting a widow, but not a widower, to elect against a spouse's will, compare Estate of Baer, 562 P.2d 614 (Utah) (upholding statute), appeal dismissed, 434 U.S. 805 (1977) with Hess v. Wims, 613 S.W.2d 85 (Ark. 1981) (striking down statute) and In re Estate of Reed, 354 So. 2d 864 (Fla. 1978) (same); and

- the constitutionality of criminal statutes imposing different penalties on men and women for nonsupport of spouses and children, compare Perini v. State, 264 S.E.2d 172 (Ga. 1980) (upholding statute) and Huskins v. State, 266 S.E.2d 163 (Ga. 1980) (same) with State v. Fuller, 377 So. 2d 335 (La. 1979) (striking down statute), Lloyd v. State Div. of Parole and Probation, 557 F. Supp. 1297 (D. Md. 1983) (same), and People v. Lewis, 309 N.W.2d 234 (Mich. Ct. App. 1981) (same).

Even on a question that this Court has clearly answered -- who carries the burden of proof to demonstrate the "importance" of the government's interest and whether that interest is "substantially related" to the classification at issue, see Hogan, 458 U.S. at 724 -- the lower courts have failed to agree. Compare Hines v. Caston School Corp., 651 N.E.2d 330, 335 (Ind. Ct. App. 1995) (burden is on the challenger) (citations omitted) and Olesen v. Board of Educ. of Sch. Dist. No. 228, 676 F. Supp. 820, 823 (N.D. Ill. 1987) (same) with Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734, 737 (R.I. 1992) (burden is on the state) and Contractors Ass'n of Eastern Pa., 735 F. Supp. at 1300 (same).

B. This Court's Recent Decision in Adarand Reinforces the Need To Clarify the Proper Standard of Review for Gender-Based Classifications

Clarification of the proper standard of review for gender-based classifications is also necessary to ensure consistency in this Court's jurisprudence. The Court's recent decision in Adarand, coupled with its earlier decision in Croson, has created an anomaly in equal protection law. For this reason as well, classifications based on gender should be subject to strict scrutiny.[6]

Under Adarand and Croson, race-based classifications, including certain programs intended to remedy race discrimination against minorities, are subject to strict scrutiny. If gender-based classifications continue to be evaluated under intermediate scrutiny, white males will have greater constitutional protection from race-conscious affirmative action, however benignly intended, than women will have from invidious sex discrimination.[7] As a matter

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[6] Amici believe that racial and sex-based classifications intended to remedy discrimination should be subject to review under a standard less stringent than strict scrutiny. However, particularly since the Court has held that strict scrutiny applies to all race-based classifications regardless of intention, amici urge that sex-based classifications that discriminate against women be accorded the same treatment.

[7] Cf. Adarand, 115 S. Ct. at 2122 (Stevens, J., dissenting) (noting the "anomalous result" created by the application of strict scrutiny to affirmative action programs designed to remedy invidious race

of logic and history, this result cannot be squared with a principled equal protection analysis.

Moreover, as a matter not of law, but of practical reality, unless the Court applies a standard of strict scrutiny to classifications based on gender, it will be easier for the government to discriminate against women than to remedy discrimination against them. Many affirmative action programs, as in Adarand, are designed to remedy discrimination against both minorities and women.[8] Although not required by this Court's precedents, public policy makers are likely to continue to treat women and minorities similarly under these programs, thereby applying the standard of strict scrutiny to affirmative action programs benefiting women that they now must apply to affirmative action programs benefiting minorities.[9]

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discrimination yet intermediate scrutiny to affirmative programs designed to remedy sex discrimination).

[8] One of the federal programs discussed in Adarand presumed that women as well as members of minority groups were "socially and economically disadvantaged individuals," and created incentives to encourage the awarding of federal contracts to such individuals. Adarand, 115 S. Ct. at 2102.

[9] Indeed, although nothing in Adarand or in Croson supports such application, some courts have already improperly applied strict scrutiny to gender-based affirmative action programs. See Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1993), cert. denied, 114 S. Ct. 1190 (1994); Conlin v. Blanchard, 890 F.2d 811 (6th Cir. 1989); Cone Corp. v. Hillsborough County, 723 F. Supp. 669 (M.D. Fla. 1989). But

Consequently, unless gender-based discrimination is subjected to strict scrutiny, the government will in practice exercise greater leeway to create and implement programs or policies that discriminate against women than programs or policies designed to overcome such discrimination. Such an anomaly represents a serious miscarriage of justice and has no place in equal protection jurisprudence. This Court in Adarand insisted that consistency was an important principle in equal protection law. See Adarand, 115 S. Ct. at 2112-13. The Court should act to salvage that principle now.

In sum, the Court should not require litigants who have been subjected to discrimination to proceed under intermediate scrutiny. It should not require the lower courts to struggle with an unworkable standard. And it should not let the anomaly created by Adarand become any more entrenched. Instead, the Court should declare without further delay that gender classifications must be subject to strict scrutiny.

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see Associated Gen. Contractors, 813 F.2d at 941 (applying intermediate scrutiny to gender-based affirmative action plan).

II. GOVERNMENTAL CLASSIFICATIONS BASED ON GENDER REQUIRE THE APPLICATION OF STRICT SCRUTINY

A. All the Reasons Articulated by This Court for Applying Strict Scrutiny Exist with Respect to Gender-Based Classifications

This Court has identified a number of warning signals that indicate that a classification is suspect and therefore warrants strict scrutiny. Although these signals are not prerequisites to declaring a class to be suspect, they raise concern whether governmental processes have been infected by prejudice or stereotypes. Thus, the Court has considered whether a classification rests on immutable characteristics unrelated to ability, Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion); Lyng v. Castillo, 477 U.S. 635, 638 (1986); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-41 (1985), whether there is a history of "purposeful unequal treatment" against the affected class, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976), and whether the targeted class has been underrepresented in the political process, Frontiero, 411 U.S. at 686. See also Plyler v. Doe, 457 U.S. 202, 216-17 n.14 (1982).

In Frontiero, a plurality of this Court, focusing on these warning signals, concluded that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect, and must therefore be

subjected to close judicial scrutiny." Frontiero, 411 U.S. at 688. As shown below, the factors that persuaded the plurality in Frontiero to recognize sex as a suspect class have equal force today.

1. Sex, Like Race and National Origin, Is an Immutable Characteristic Unrelated to Ability

In Frontiero, the plurality emphasized the immutability of gender and its lack of connection with individual ability. See Frontiero, 411 U.S. at 686. When a characteristic, such as gender, does not determine the ability of an individual "to perform or contribute to society," id., classifications based on that characteristic are unlikely to further a legitimate state interest. Rather, as this case demonstrates, the classification may well reflect stereotypes, with the effect of excluding women from power in a particular domain. This Court has repeatedly recognized that danger with regard to gender. See, e.g., J.E.B., 114 S. Ct. at 1422 (sex-based classifications may not "serv[e] to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women").

Governmental classifications based on gender stereotypes stigmatize and harm women, inflicting injuries that extend beyond those persons immediately affected by the government's action. Stanton v. Stanton, 421 U.S. 7, 14-15 (1975) (striking down state statute that relied on "old notions" to require child support for males up to age 21 and

females up to age 18, which effectively denied females a college education); Orr v. Orr, 440 U.S. 268, 283 (1979) (striking down legislative classification that risked "reinforcing the stereotypes about the 'proper place' of women" and denied aid to needy men); see also Hogan, 458 U.S. at 725, 730 n.15 (stating that "[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions," and noting that, although purportedly based on a protective rationale, "excluding men from the field [of nursing] has depressed nurses' wages").

The facts and history of this case underscore that governments continue to use stereotyped gender classifications that block women's participation in powerful societal institutions. The decisions below, and the actions of Virginia that they validate, rely on numerous stereotypes to exclude women from a prestigious educational institution. In the telling phrase of the district court, Virginia -- legitimately in the court's view -- sought to teach men to march "to the beat of a drum" and women "to the melody of a fife." A. 84a. This should indeed raise a red flag that there is a need for a more clear-cut and exacting standard of review of governmental classifications based on gender.

2. There Is a Long History of Sex Discrimination in the United States, and Such Discrimination Continues Today

A second warning signal this Court looks to in determining whether to apply strict scrutiny is a history of

discrimination against the group at issue. See Frontiero, 411 U.S. at 684-85; Murgia, 427 U.S. at 313. Such a history signals that governmental decision making may be tainted by stereotypes and prejudice, resulting in invidious discrimination and exclusion. Plyler, 457 U.S. at 216-17 n.14.

As the plurality recognized in Frontiero, "[t]here can be no doubt that our Nation has a long and unfortunate history of sex discrimination." 411 U.S. at 684. From its beginning, the United States maintained a dual system of law for men and women -- separate and unequal. The Constitution effectively excluded women from the vote and from service in the national legislature by permitting state law -- which explicitly reserved the vote and service in the state legislature to men -- to control federal elections and service in Congress.[10]

The federal and state legislatures provided women no remedy for their exclusion from colleges, from the professions, from the best jobs, and from equal pay.[11] State law made the husband the legal "head" of each family -

[10] Barbara Allen Babcock et al., Sex Discrimination and the Law: Causes and Remedies 69-70 (1975).

[11] Not until the 1960s did the nation begin to take action on the job front, through the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1988), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1988), and not until the 1970s did it take action on the education front, through Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1994).

- a choice left to the states' sole discretion by the Constitution.[12] Even after the convulsive changes wrought by the Civil War and the Fourteenth Amendment, the judiciary held that women had neither the right to vote, Minor v. Happersett, 88 U.S. (21 Wall.) 162, 177-78 (1875), nor the right to practice law, see Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1873). Indeed, as this Court recently observed in the jury context, the position of women throughout much of the 19th century "was, in many respects, comparable to that of blacks under the pre-Civil War slave codes." J.E.B., 114 S. Ct. at 1425 (quoting Frontiero, 411 U.S. at 685). See also Gunnar Myrdal, An American Dilemma: The Negro Problem and American Democracy 1073 (Appendix 5) (1944) (recognizing that the legal status of women and children served as a model for the legal status of slaves). It was not until 1920 that women finally gained the right to vote.

As women moved into the new industrial workforce in the late 19th and early 20th centuries, states enacted laws explicitly requiring both private and public employers to discriminate against women at work. Such laws required,

[12] As head of the family the husband voted for the wife, owned her personal property, managed and controlled all of her real property, owned her labor, and was entitled to custody and control of her children. The husband also chose his wife's domicile and was responsible for her debts. The husband was specifically immunized from any legal consequences for raping his wife and was effectively immunized for beating her by the law's reluctance to intervene unless she suffered serious and permanent injury. Babcock et al., supra note 10, at 561-63. See also id. at 1-2 (describing the dual law system for men and women).

for example, employers to exclude women from certain occupations, from more lucrative overtime work, heavy work, night work, and from working before or after childbirth. Babcock et al., supra note 10, at 261. Even as late as 1948, this Court upheld a statute prohibiting women from being bartenders because of the "moral and social problems" that arise when women -- but apparently not men -- tend bar. Goesaert v. Cleary, 335 U.S. 464, 466 (1948).[13]

Such stereotyping has continued to exclude women from spheres of power throughout the 20th century. As late as 1961, the Court justified an exemption from jury service for women on the ground that "woman is still regarded as the center of home and family life" unless "she herself determines that such service is consistent with her own special responsibilities." Hoyt v. Florida, 368 U.S. 57, 62 (1961). It was not until 1975 that the Court finally struck down an exemption from jury service for women. See Taylor v. Louisiana, 419 U.S. 522, 537 (1975). And, of particular relevance here, not until 1970 was the University of Virginia ordered to admit women. See Kirstein v. Rector & Visitors of the Univ. of Va., 309 F. Supp. 184, 187 (E.D. Va. 1970).

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[13] Compare Goesaert, 335 U.S. at 467 (rejecting argument that legislature's exclusion of women, except wives or daughters of male owners, from bartending "was an unchivalrous desire of male bartenders to try to monopolize the calling") with Babcock, supra note 10, at 280-81 (recounting vigorous campaign waged by bartender's union after World War II to restore bartending to an exclusively male job).

Despite the advances of women in society, and despite the application of intermediate scrutiny to sex-based classifications nearly 20 years ago, the stereotypes reflected in the historical record persist. This Court's recognition in Frontiero, over two decades ago, that "women still face pervasive, though at times more subtle, discrimination," 411 U.S. at 686, remains true today.

Although women now compose nearly half the U.S. workforce,[14] they are still relegated to jobs that generally pay less and provide fewer benefits than traditionally "male" jobs. For example, women occupy predominantly administrative support jobs: in 1991, one out of every four working women held such a job, and women constituted 82 percent of the total administrative support workforce in all industries.[15] Women are also underrepresented in many professional and technical jobs, comprising only 8.6 percent of all engineers, 3.9 percent of airplane pilots and navigators, 18.6 percent of architects, and little more than 20 percent of doctors and lawyers.[16] While

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[14] Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 396 (1994).

[15] 9 to 5, Profile of Working Women 1 (1992-93) (based on U.S. Bureau of Labor Statistics and Bureau of Census data) (on file with National Women's Law Center); Equal Employment Opportunity Commission, Job Patterns for Minorities and Women in Private Industry 1993 1 (1994) (table 1).

[16] Bureau of the Census, supra note 14, at 407-09 (citing 1994 census data).

89.5 percent of all dentists are male, 99.3 percent of all dental hygienists are female.[17]

Even where women have begun to overcome traditional barriers to entry, they remain disproportionately in the lower ranks of workplace hierarchies. For example, women are now 23 percent of attorneys, but only 10 percent of law firm partners.[18] The Federal Glass Ceiling Commission recently found that, in 1994, only two of the Fortune 1000 companies had female Chief Executive Officers, and, of the Fortune 1500 companies' senior managerial positions, only three to five percent were held by women.[19]

Women also continue to earn less than their male counterparts in comparable jobs. In 1994, women earned an average of 72 cents for every dollar earned by men.[20] A wage disparity between men and women exists even where their educational levels are the same, and in fact increases as men's and women's levels of education increase. In a 1989 study, women who had completed four years of college

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17 Id.

18 Id. at 407; Curran and Carson, American Bar Foundation, The Lawyer Statistical Report 10 (1994).

19 Federal Glass Ceiling Commission, Good for Business: Making Full Use of the Nation's Human Capital 12 (1995).

20 National Committee on Pay Equity, The Wage Gap: 1993 (citing U.S. Dep't of Commerce, Bureau of the Census, Current Population Reports, Series P-60).

earned $26,709, while their male counterparts earned $38,565.[21] Even when women have more education than men, they generally earn less. In 1979 and 1989, women with a high school diploma earned less than or as much as men with only an elementary school education. Similarly, women with some college education earned less than men with a high school degree.[22]

The stubborn persistence of these disparities demonstrates that women remain a disadvantaged group and that gender-based stereotypes continue to infect society at large. Indeed, the Federal Glass Ceiling Commission cited stereotyping as one of the major barriers to advancement of women in the workplace.[23]

In sum, there is a longstanding and continuing history of discrimination against women -- discrimination that, as this Court has recognized, can too easily infect the processes of governmental decision making. Just as the remnants of the law of slavery and the post- Civil War Black Codes -- that

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21 Women's Bureau, U.S. Dep't of Labor, Women Workers: Trends and Issues 35, 97 (1993). These disparities exist even after controlling for work experience, hours of work, family responsibilities, and other variables. See Robert G. Wood et al., Pay Differences Among the Highly Paid: The Male-Female Earnings Gap in Lawyers' Salaries, 11 J. Lab. Econ. 417, 430-31 (July 1993).

22 Women's Bureau, supra note 21, at 97.

23 Federal Glass Ceiling Commission, supra note 19, at 28.

dual structure of laws governing whites and blacks -- are suspect, so should the vestiges of that preexisting legal system that confined and disadvantaged women be equally suspect.[24]

3. Women Are Underrepresented in the Political Process

Because the Court has applied strict scrutiny to ensure that prejudice and stereotypes have not tainted the political process to the disadvantage of particular groups, it has viewed underrepresentation in the political process as another warning sign in determining whether a classification is suspect. See, e.g., Frontiero, 411 U.S. at 686; Foley v. Connelie, 435 U.S. 291, 294 (1978). The plurality in Frontiero, in noting that women face "pervasive discrimination," found that the effects of this discrimination persisted "most conspicuously in the political arena." Frontiero, 411 U.S. at 686.[25]

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[24] It is precisely those vestiges of the dual system of law for men and women that must be subjected to the strictest scrutiny -- a scrutiny informed by our all too recent recognition of the historical depth and persistence of sex discrimination in this country and the difficulty the judiciary has had in recognizing discrimination in culturally accepted stereotypes. See, e.g., Wendy Williams, The Equality Crisis: Some Reflections on Culture, Courts and Feminism, 7 Women's Rts. L. Rep. 175 (1982).

[25] Indeed, this underrepresentation is hardly surprising given this country's history regarding exclusion of women from the right to vote. See Ruth Bader Ginsburg, Women as Full Members of the Club: An Evolving American Ideal, 6 Hum. Rts. 1, 4 (1976-77).

Although women are not entirely powerless in the political arena, very little has changed since this Court decided Frontiero over 20 years ago. In 1995, women constitute only eight percent of all U.S. Senators and 10.8 percent of all U.S. Representatives.[26] No woman has ever served as President or Vice President of the United States, a Secretary of State, Secretary of the Treasury, Secretary of Defense, or Speaker of the House.

The representation of women in state governments is only minimally more encouraging. In 1995, only 20.7 percent of state legislators are women.[27] Women hold only 25.9 percent of all state elective executive offices,

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[26] Center for the American Woman and Politics, Women in Elective Office 1995 (1995) (fact sheet); Center for the American Woman and Politics, Women Candidates and Winners in 1992 (1992) (fact sheet). Notably, women are significantly less well represented in the U.S. Congress than in the parliaments of other countries. See United Nations, The World's Women: 1995 Trends and Statistics 152 (1995) (chart 6.1).

[27] Center for the American Woman and Politics, Women in Elective Office 1995 (1995) (fact sheet).

and there is only one woman governor in all 50 states.[28] Women constitute only 18 percent of all mayors of cities with a population over 30,000.[29]

As the plurality in Frontiero recognized, Congress itself has acknowledged that "classifications based upon sex are inherently invidious," by enacting measures to ameliorate certain types of gender-based discrimination. Frontiero, 411 U.S. at 687-88. See, e.g., Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1994) (generally prohibiting sex discrimination in federally funded education programs); Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2 (1988) (prohibiting sex discrimination by employers with 15 or more employees). However, these and other measures are incomplete, and they do not suggest that women have achieved full political power.

For example, while Title VI of the Civil Rights Act, 42 U.S.C. § 2000d (1988), prohibits discrimination in federally funded programs on the basis of race, color, or national origin, and the Rehabilitation Act of 1973 (§ 504), 29 U.S.C. § 794 (1988), provides similar protection from discrimination based on disability, to this day there is no parallel federal statutory protection from

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28 Id.

29 Id.

government-sponsored discrimination based on sex.[30] Likewise, women are not statutorily protected against discrimination in places of public accommodation, although federal law prohibits such discrimination on the basis of race, color, religion, national origin, or disability. See 42 U.S.C. § 2000a (1988) and § 12182 (Supp. V 1993). There also is no statutory prohibition of discrimination based on sex in the making and enforcement of contracts, although race discrimination in this context is prohibited. See 42 U.S.C. § 1981 (1988). Other federal laws address violence and "hate crimes" based on race, religion, or national origin, but not based on sex. See 18 U.S.C. § 245(b)(2) (1994) and 28 U.S.C. § 534 Note (Supp. II 1990).

In sum, the warning signal of political underrepresentation continues to militate in favor of strict scrutiny of classifications based on gender.

B. Arguments Against the Application of Strict Scrutiny to Gender-Based Discrimination Are Unconvincing

In Frontiero, the only articulated argument against applying strict scrutiny to gender-based classifications was that the Equal Rights Amendment, if adopted, "will resolve the substance of this precise question." Frontiero, 411 U.S.

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30 Although Title IX was modeled after Title VI in form, it is limited to education programs or activities.

at 692 (Powell, J., concurring). The Equal Rights Amendment, although approved by Congress and 35 states, narrowly failed to achieve the requisite state ratification over 13 years ago. It no longer provides a reason for the Court to stay its hand.

In his dissent in J.E.B., Chief Justice Rehnquist suggested that discrimination based on gender did not merit equivalent treatment to racial discrimination because "[r]acial groups comprise numerical minorities in our society, warranting in some situations a greater need for protection, whereas the population is divided almost equally between men and women." 114 S. Ct. at 1435. But, as noted, the number of women in the population has not prevented predominantly male legislatures from enacting state-sponsored discrimination, nor deterred a predominantly male judiciary from upholding gender-based distinctions that disadvantage women, nor extinguished the stereotypes that block advancement in a society still dominated by men. In any event, the Court in Adarand and Croson made clear that strict scrutiny applies equally to racial classifications affecting whites, a substantial majority in this country. See Adarand, 115 S. Ct. at 2110. Thus, minority status is not a talisman for invocation of strict scrutiny.

The Chief Justice also observed in J.E.B. that, "while substantial discrimination against both groups still lingers in our society, racial equality has proved a more challenging goal to achieve on many fronts than gender equality."

114 S. Ct. at 1435.[31] But absolute parity between racial and sexual discrimination is not a prerequisite for this Court to find that classifications based on gender warrant strict scrutiny.[32] Rather, what this Court should focus on is that, as the Chief Justice observed, "substantial discrimination . . . still lingers," id., and that women continue to be excluded from public educational institutions based on their gender rather than their individual ability, as exemplified by the decisions below. These factors counsel strict scrutiny of classifications based on gender.[33]

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[31] Although certainly there are differences between the histories of race and sex discrimination in this country, the important truth remains that women continue to suffer the effects of historic and persistent sex discrimination. See J.E.B., 114 S. Ct. at 1422-1425. Moreover, attempts to establish "a pecking order of oppression" are both divisive and unproductive. See Henry Louis Gates, Jr., Blacklash?, The New Yorker, May 17, 1993, at 42, 43.

[32] This Court has applied strict scrutiny to other suspect classes without a finding of absolute parity with race. See e.g., Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (applying strict scrutiny to classification based on alienage). Moreover, attempts to prioritize the historic significance and impact of race and sex discrimination ignore the interrelation between both types of discrimination and their combined effect in American society. See Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics, 1989 U. Chi. Legal F. 139 (exploring the intersection of race and gender discrimination); Patricia J. Williams, The Alchemy of Race and Rights (1991) (same).

[33] Nor does the presence of actual physical differences between men and women justify a more lenient standard of review for sex discrimination than race discrimination. To the extent that sex-based

There is likewise no valid argument that strict scrutiny is so rigid as to prohibit all sex-based classifications in affirmative remedial programs. Strict scrutiny, as applied to classifications designed to remedy past discrimination, is not inevitably fatal to the classification. Justice O'Connor specifically addressed this very issue in Adarand. See 115 S. Ct. 2097, 2117 (1995). See also id. at 2134 (Ginsburg, J., dissenting) (note that affirmative action programs can satisfy strict scrutiny).[34] The application of strict scrutiny in the sex discrimination context will not preclude the government's ability to adopt genuine affirmative action programs for women.

CONCLUSION

For the reasons set forth above, the Court should reverse the decision below and hold that discrimination based on gender is inherently suspect and warrants the highest level of judicial scrutiny.

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classifications are required by physical characteristics unique to one sex, a strict scrutiny analysis can accommodate those differences. See Jennifer Friesen, State Constitutional Law: Litigating Individual Rights Claims and Defenses ¶ 3.02(c)(i) (1994) (discussing state equal rights amendments).

[34] Thus, for example, single-sex educational programs could withstand strict scrutiny if they were narrowly tailored to serve a genuinely remedial purpose. Cf. Hogan, 458 U.S. at 729-30.

Respectfully submitted,

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APPENDIX

National Women's Law Center

The National Women's Law Center ("NWLC") is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972. the Center has worked to secure equal opportunity in education for girls and women through full enforcement of the Constitution and laws prohibiting discrimination. It has a deep and abiding interest in assuring the eradication of state sponsored discrimination against women and girls in education.

American Civil Liberties Union

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization of nearly 300,000 members which is dedicated to preserving the Bill of Rights. The ACLU Women's Rights Project, established in 1971, has been a leader in persuading courts to extend the protections of the Constitution to bring down the barriers to full equality for women in American society. The ACLU Women's Rights Project served as co-counsel to Shannon Richey Faulkner in her challenge to the all-male state military school, The Citadel of South Carolina. The ACLU has a direct and profound interest in the outcome of the VMI litigation, and adds an invaluable perspective to this appeal as *amicus curiae*. The need for this Court's guidance on the proper application of intermediate scrutiny is perhaps nowhere better illustrated than by the turn of events in the Citadel litigation, in which, under the Fourth Circuit's order, the case has been remanded to the trial court to litigate the constitutionality of segregated educational programs under the cloud of the two unconstitutional standards concocted by

the Fourth Circuit -- both the "special" intermediate scrutiny and the "substantively comparable" tests.

American Association of University Women

The American Association of University Women's ("AAUW") 150,000 members work for education and equity for women and girls. Since 1881, AAUW has advocated for equal education opportunities for students at every level. AAUW joins this brief because of its interest in ensuring that women have equal access to prestigious state institutions of higher education.

The American Jewish Committee

The American Jewish Committee ("AJC") is a national civic organization of approximately 50,000 members which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. AJC has always believed that this goal can best be accomplished by helping to preserve and promote the constitutional rights of all Americans. Specifically, AJC strongly supports full and equal rights for women and is committed to the elimination of all gender-based discrimination, regardless of the form in which it may appear. We believe that the alternative educational plan presented by the state of Virginia was based upon outdated gender stereotypes and fails to provide an equivalent educational training experience for women, thus depriving women of equal protection under the law.

Anti-Defamation League

The Anti-Defamation League ("ADL") is one of the nation's oldest civil rights and human relations organizations, founded in 1913 to combat anti-Semitism and to promote

good will among all races, ethnic groups, and religious groups. ADL's ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens. For eight decades the ADL has actively combated discrimination in employment, housing, education, and public accommodations.

Business and Professional Women/USA

Business and Professional Women/USA ("BPW/USA"), founded in 1919, promotes equity for all women in the workplace through advocacy, education and information. With 80,000 members in 2,800 local organizations throughout all 435 Congressional districts, BPW/USA is comprised of women and men of every age, race, religion, political party and socio-economic background. BPW/USA supports this amicus brief because we understand that full access to the widest possible range of educational opportunities is crucial if women are to achieve full economic equity in the workplace and society.

Center for Women Policy Studies

The Center for Women Policy Studies was founded in 1972 as the first national policy research and advocacy institute focused exclusively on issues of social and economic justice for women. The Center conducts research and advocacy programs on sexual harassment and violence against women, work/family and "diversity" policies of employers, education, and other relevant issues.

Coalition of Labor Union Women

The Coalition of Labor Union Women ("CLUW"), founded in 1974, is a national association of over 20,000 union members which advances the benefits of organized workplaces for women and promotes women's leadership development within the labor movement. CLUW is also an advocacy organization on behalf of millions of American working women, promoting affirmative action, leadership, health care reform, pay equity, child care options, and reproductive health. The Coalition of Labor Union Women opposes discrimination against women in all forms.

Connecticut Women's Education and Legal Fund

The Connecticut Women's Education and Legal Fund ("CWELF") works through legal and public policy strategies and community education to end sex discrimination and empower all women to be full and equal participants in society. CWELF was founded in 1973 and has over 1,000 members. CWELF seeks to join this case as amicus curiae because it is integral to our mission to ensure equal educational and occupational opportunities for women.

Feminist Majority Foundation

The Feminist Majority Foundation ("Foundation") is a non-profit organization with offices in Arlington, Virginia and Los Angeles, California. The Foundation focuses on using research and education to eliminate sex discrimination and promote equality, women's rights, and a feminist agenda including gender equity in education.

Federally Employed Women, Inc.

("FEW") is an international nonprofit organization representing over one million civilian and military women employed by the Federal government. Since its inception in 1968, FEW's primary objective has been to eliminate sex discrimination and sexual harassment and enhance career opportunities for women in government. The Virginia Military Institute case is particularly of interest to FEW in that it denies young women the opportunity to receive quality military training and further perpetuates the notion that the military services can willfully and legally maintain policies and practices that are clearly discriminatory on the basis of gender.

Mexican American Legal Defense and Educational Fund

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national nonprofit civil rights organization established in 1967. Its principal objective is to secure the civil rights of Latinos in the United States through litigation and education. It frequently represents plaintiffs in equal protection challenges to education programs and appears as amicus curiae in federal courts, including cases before this Court.

National Association for Girls & Women in Sport

For nearly 100 years the National Association for Girls & Women in Sport ("NAGWS") has been the primary educational organization dedicated to help ensure quality and equality in girl's and women's sports programs. The organization includes over 10,000 teachers, coaches, trainers, athletic directors and administrative and sport officials who are dedicated to gender equality. The Virginia

Military Institute case is one of many that will help to promote equality for girls and women.

National Association of Social Workers

The National Association of Social Workers, Inc. ("NASW"), a nonprofit professional association with over 160,000 members, is the largest organization for social workers in the world. The Virginia Chapter has over 3,300 members. The Association is devoted to promoting the quality and effectiveness of social work practice, to advancing the knowledge base of the social work profession and to improving the quality of life through utilization of social work knowledge and skill. NASW is interested in this case because of its implications for the Constitutional guarantee of equal educational opportunity for women.

National Council of Jewish Women

The National Council of Jewish Women ("NCJW"), Inc. is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community services to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has 90,000 members in over 500 communities around the country. The National Council of Jewish Women believes that "individual liberties and rights guaranteed by the Constitution are keystones of a free and pluralistic society and must be protected." Based on NCJW's *National Resolutions* stating our belief that equality of rights shall not be denied or abridged on the basis of gender, we join this brief.

National Council of Negro Women

The National Council of Negro Women ("NCNW") is the nation's most broadly based organization of African American women. A nonprofit voluntary service organization and 250 community based sections, NCNW conducts outreach to over four million women. Pursuant to NCNW's goal of providing greater opportunities for African American women, NCNW opposes sex discrimination in publicly funded universities such as the Virginia Military Institute.

National Education Association

The National Education Association ("NEA") is a nationwide employee organization with a current membership of 2.2 million members, the vast majority of whom are employed by public education institutions. Because NEA has long opposed gender discrimination in educational institutions, it joins this brief as amicus curiae.

National Organization for Women

The National Organization for Women ("NOW") is the largest feminist organization in the United States with a membership of over 250,000 women and men and more than 750 chapters throughout the country. Since its founding in 1966, a major goal of NOW has been the eradication of sex discrimination in all aspects of education. NOW believes that until girls and women have equal access to all publicly funded educational institutions, and all of the programs therein, they are unlawfully denied the very basis of equal opportunity to compete and achieve in every aspect and level of U.S. society. In furthering its commitment to that goal, NOW has participated in numerous legal cases and worked

for legislation and regulations to secure full enforcement of laws prohibiting sex discrimination in education.

NOW Legal Defense and Education Fund

The NOW Legal Defense and Education Fund ("NOW LDEF") is one of the nation's foremost nonprofit advocacy organizations dedicated to the elimination of sex discrimination. Since its inception in 1970, the NOW LDEF has been involved in many federal and state cases concerning the issues of sexual harassment, education and women's rights. NOW LDEF is especially concerned with the issues raised in this case because of the importance of ensuring that women and girls receive non-discriminatory education under non-discriminatory conditions.

National Women's Conference Committee

Since its inception in 1977, the National Women's Conference Committee ("NWCC") has supported the grassroots movement for women's rights, as well as legal, economic, and social changes to ensure women's equality. The NWCC supports equal educational opportunities for women and girls, and therefore opposes sex discrimination in publicly funded colleges and universities.

National Woman's Party

The National Woman's Party, founded in 1913, is a historic, nonprofit, nonpartisan organization devoted to equality for women. In keeping with our historic commitment to equality for all people, the National Woman's Party strongly supports the inclusion of young women as full and equal participants at the Virginia Military Institute and joins this amicus brief in the VMI case.

Older Women's League

The Older Women's League ("OWL") is the first and only national grassroots membership organization whose sole mission is to address the special concerns and needs of women as they age. OWL has a long history of fighting discrimination and working for equal access in education, employment, and all other areas of daily life.

People For the American Way

People For the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has been actively involved in efforts to combat discrimination and promote equal rights, including supporting the enactment of civil rights legislation, participating in civil rights litigation, and conducting programs and studies directed at reducing problems of bias, injustice and discrimination. As this Court has recognized, government classifications based on gender all too often reflect our nation's "long and unfortunate

history of sex discrimination." People For strongly supports the principle that strict scrutiny should be applied to government classifications based on gender, in order to ensure that a clear-cut and demanding standard of review is applied to such classifications.

Trial Lawyers for Public Justice

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm dedicated to using trial lawyers' skills and strategies to advance the public good. Supported by a nationwide network of over 1,500 of the country's outstanding trial attorneys, TLPJ has actively pursued numerous sex discrimination in education cases under the equal protection clause, in addition to federal statutory provisions.

Women Employed

Women Employed is a national organization of working women, based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination. Women Employed works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service and public education. Women Employed strongly believes that one of the most fundamental guarantees that women are entitled to the under equal protection of the law concerns opportunity.

Women's Law Project

The Women's Law Project ("WLP") is a non-profit, feminist legal advocacy organization located in Pennsylvania. Founded in 1974, WLP works to abolish discrimination and

injustice and to advance the legal and economic status of women and their families through litigation, public policy advocacy and education. WLP believes that access to equal educational opportunities is essential to achieving equal rights for women, and has worked throughout its twenty-one year history to eliminate sex discrimination in education.

Women's Legal Defense Fund

Founded in 1971, the Women's Legal Defense Fund ("WLDF") is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. WLDF has been an active participant in virtually all major sex discrimination cases before the Supreme Court, in countless cases in the lower federal courts, in congressional efforts to remedy sex discrimination, and in nationwide education efforts to inform policymakers and others about sex discrimination.

Women Work! The National Network for Women's Employment

Women Work! The National Network for Women's Employment represents more than 1300 local women's employment and training programs throughout the country who are working to promote gender equity and eliminate sex bias and sex stereotyping in training and education. Women Work! is committed to building awareness and promoting programs and policies to meet the needs of women and girls entering, reentering, and/or training for the work force. Women Work! believes that the exclusion of women from the Virginia Military Institute violates women's right to equal protection under the fourteenth amendment, and that

the establishment of a separate program at Mary Baldwin College sets up a less rigorous training program that is based on gender stereotypes about men's and women's learning abilities.

Supreme Court, U.S.
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No. 94-1941

In the
Supreme Court of the United States
OCTOBER TERM, 1994

UNITED STATES OF AMERICA,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE STATES OF MARYLAND, HAWAII, MASSACHUSETTS, NEVADA, AND OREGON, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does Virginia's refusal to admit women to a state-operated military college fail to serve any legitimate state objective and thus violate the Equal Protection Clause of the Fourteenth Amendment?

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BRIEF OF THE STATES OF MARYLAND, HAWAII, MASSACHUSETTS, NEVADA, AND OREGON, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as *amici curiae* in support of petitioner.

INTEREST OF *AMICI CURIAE*

This case involves fundamental issues of fairness that affect one of the most basic obligations of the *Amici* States: the duty to provide and otherwise ensure equal access to educational opportunities for all citizens. Stating that "education is perhaps the most important function of state and local governments," this Court over forty years ago recognized that no "child may reasonably be expected to succeed in life if he [or she] is denied the opportunity of an education." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). This core governmental obligation extends to higher education, *see United States v. Fordice*, 112 S.Ct. 2727 (1992); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), and encompasses the right of women to receive equal access to an education specially tailored to prepare them for military service.

Women are entitled to choose a military career and are likewise entitled to the same educational and training opportunities made available to men. The presence of women in the United States military has expanded significantly in recent years, and so have their opportunities in all areas of the armed forces. Indeed, as Judge Motz pointed out in dissenting from denial of rehearing *en banc*, the United States has eliminated its rule excluding women from combat duty because "the rule was an 'armor-plated ceiling' preventing the advancement of women in the military." App. 257a. *Amici* agree with Judge Motz, who stated that "[a]nyone who is prepared to do combat for her country -- indeed, to be killed in preparation for that combat -- should be eligible to apply for what she perceives to be the best possible training." App. 257a.

While the need to make that training available to women is more acute today than at any time in the past,

opportunities for a military-oriented education are severely restricted. There are only five United States military academies, two State military institutions (including one that is a party in this case), and one private university whose missions are to provide an undergraduate military education.[1] These schools "offer[] a unique combination of education and training that makes a positive contribution offered by no other institution," App. 151a; *see also, e.g., Jones v. Faulkner*, 858 F.Supp. 552, 556 (D.S.C.1994), *modified*, 51 F.3d 440 (4th Cir.), *cert. denied*, 64 U.S.L.W. 3284 (1995), and their graduates are likely to have successful military careers. *See* App. 137a-138a ("Among the thousands of [VMI] alumni who have served this country during war is General of the Army George C. Marshall, and six have been awarded the Congressional Medal of Honor.").

Yet, while each of the United States military academies admits women, VMI and The Citadel refuse to do so. Thus, over 5,000 fewer openings presently are available to women interested in a military career than are available to men. *See* 1995 Higher Education Directory at 323 (showing total enrollment of 4,263 men at The Citadel); *id.* at 374 (enrollment of 1,191 men at VMI). The *Amici* States have

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[1] The United States military academies consist of the Air Force Academy in Colorado Springs, Colorado, the Coast Guard Academy in New London, Connecticut, the Merchant Marine Academy in Kings Point, New York, the Military Academy in West Point, New York, and the Naval Academy in Annapolis, Maryland. Each of these institutions is co-educational. *See* 1995 Higher Education Directory at 394-395. The Virginia Military Institute, The Citadel in Charleston, South Carolina, which are both male-only, and Norwich University, a privately operated, co-educational institution in Northfield, Vermont, appear to be the only other military-oriented schools at which a four-year undergraduate degree can be obtained.

a strong interest in the right of their women citizens to be afforded equal access to these limited educational opportunities.

STATEMENT

The record in this case demonstrates that Virginia has no legitimate state interest in refusing to admit women, and that its reasons for doing so are a pretext for preserving a tradition of outdated gender stereotypes that serve no lawful role in modern society.

The United States initiated this action in 1990, challenging the male-only admissions policy of the Virginia Military Institute (VMI), a state institution founded in 1839, on the ground that it violates the Equal Protection Clause of the United States Constitution. The United States District Court for the Western District of Virginia upheld VMI's exclusion of women. App. 158a. On appeal, the United States Court of Appeals for the Fourth Circuit vacated and remanded. Stating its agreement with "the district court's factual determinations that VMI's unique methodology justifies a single-gender policy and material aspects of its essentially holistic system would be substantially changed by coeducation," the court of appeals nevertheless held that "Virginia has failed to articulate an important objective which supports the provision of this unique educational opportunity to men only. . . ." App. 137a. The court of appeals remanded the case with instructions to the district court "to give to the Commonwealth the responsibility to select a course it chooses, so long as the guarantees of the Fourteenth Amendment are satisfied." App. 156a.

VMI filed a petition for certiorari seeking review of the court of appeals' decision; the petition was denied on May 24, 1993. App. 132a. On remand, Virginia proposed a parallel program for women, to be offered at Mary Baldwin

College, a private women's undergraduate institution. The district court acknowledged that "if 'separate but equal' is the standard by which the Commonwealth's plan must be measured, then it surely must fail, because . . . even if all else were equal between VMI and the Virginia Women's Institute for Leadership ('VWIL'), the VWIL program cannot supply those intangible qualities of history, reputation, tradition, and prestige that VMI has amassed over the years." App. 60a (footnote omitted). In addition, the district court found that the programs were *not* equal in more tangible respects: "VMI offers an engineering degree as well as several advanced math and physics courses that VWIL will not offer. . . ." App. 65a. Nonetheless, the district court found that the VWIL program excused VMI's refusal to admit women, because "it is sufficient that the Commonwealth provide an all-female program that will achieve substantially similar outcomes in an all-female environment and that there is a legitimate pedagogical basis for the different means employed to achieve the substantially similar ends." App. 76a.

On appeal, the court of appeals affirmed in a 2-1 decision. The court upheld VMI's continued exclusion of women, finding that "single-gender education constitutes a legitimate and important governmental objective," App. 18a, and that the separate educational programs available at VMI and VWIL collectively ensure that "the opportunities that would be open both to men and women are sufficiently comparable." App. 28a. The panel majority acknowledged that neither the proposed VWIL program for women nor a VWIL degree had the same historical tradition and prestige as VMI and the VMI degree. App. 27a. But the court found no constitutional objection in "this deficiency," *id.*, or in any of the other differences in the educational benefits that the programs respectively offer to women and men.

Judge Phillips dissented, asserting that the VWIL program falls "far short" of "providing substantially equal tangible and intangible benefits to men and women," and that "the contrast between the two [programs] on all the relevant tangible and intangible criteria is so palpable as not to require detailed recitation." App. 50a.

Judge Motz, joined by Judges Hall, Murnaghan, and Michael, dissented from the court of appeals' denial of rehearing *en banc*.[2] Stating that "simply providing single-gender education cannot constitute a state's legitimate and important objective for excluding one gender from a state-financed institution," App. 253a, Judge Motz observed that "[n]othing suggests, let alone provides an 'exceedingly persuasive justification,' that VMI's male-only admissions policy and 'sexually homogenous environment' are necessary to further [its] mission." App. 254a. Rather, the United States military academies, which are all co-educational, produce far more graduates who are leaders in military and civilian life than VMI does. *Id.*

SUMMARY OF ARGUMENT

In upholding VMI's longstanding historical exclusion of women, the court of appeals has revived wholly discredited doctrine from a bygone era; relied upon antiquated gender stereotypes to reach an intolerable result; and opened issues that have long (and properly) been closed in our constitutional jurisprudence. VMI's continued refusal to admit women violates the Equal Protection Clause because there is no legitimate governmental interest that justifies

[2] None of these judges was a member of the panel that decided this case. As a result of a typographical error, the appendix to the United States' petition in No. 94-1941 inadvertently failed to state that Judge Hall joined in Judge Motz's dissent. *See* 52 F.3d 90, 94 (4th Cir.1995).

such discriminatory and plainly unacceptable conduct. This Court should require VMI either to allow women to attend as men have for the past 156 years, or to close its doors.

ARGUMENT

VMI'S FAILURE TO ADMIT WOMEN IS UNCONSTITUTIONAL BECAUSE IT DOES NOT SERVE ANY LEGITIMATE STATE INTEREST

Under this Court's well-established equal protection jurisprudence, VMI must show, at a minimum, that its refusal to admit women "serve[s] important governmental objectives. . . ." *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 150 (1980) (citations omitted).[3] As this

[3] This Court has not decided whether discrimination on the basis of gender is subject to strict scrutiny. *See J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419, 1425 n.6 (1994). This issue need not be resolved in this case because VMI cannot show that its discriminatory treatment of women serves any important governmental objective. This Court also need not address the question previously reserved in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 720 n.1 (1982), "of whether States can provide 'separate but equal' undergraduate institutions for males and females," because given the significant differences that exist between VMI and the alternative program that VMI has proposed for women, "[i]t is difficult to believe that one who had a free choice between these . . . schools would consider the question close." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). As Judge Motz stated below, "how can a degree from a yet to be implemented supplemental program at Mary Baldwin be held 'substantively comparable' to a degree from a venerable Virginia military institution that was established more than 150 years ago?" App. 255a. Indeed, she pointed out, even "the majority acknowledges, in almost epic understatement, the alternative degree from Mary Baldwin 'lacks the historical benefit and prestige of a degree from VMI.'" *Id.* (*quoting* App. 27a). The panel majority apparently thought that this critical shortcoming

Court's cases provide, "gender-based classifications require 'an exceedingly persuasive justification' in order to survive constitutional scrutiny." *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419, 1425 (1994) (*quoting Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)). The decision below should be reversed because Virginia has failed to meet its heavy burden of satisfying these criteria.

VMI has no legitimate governmental objective in refusing to admit women. The court of appeals found as much in its first decision, stating that VMI "failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type of education to men and not to women." App. 155a. Nevertheless, the court subsequently stated in its second decision that it "should defer to a state's selection of educational techniques when we conclude, as we do here, that the purpose of providing single-gender education is not pernicious and falls within the range of the traditional governmental objective of providing citizens higher education." App. 21a-22a. There are at least two fundamental flaws in this analysis.

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was outweighed by "the benefits of single-gender education," stating that "[i]t is inherent in the benefit that men must be excluded from the women's program and women from the men's." App. 23a. But as this Court held in rejecting a similar argument, "[i]t is unlikely that a member of a group . . . attending a school with rich traditions and prestige which only a history of consistently maintained excellence would command, could claim that the opportunities afforded him for . . . education were unequal to those held open to petitioner." *Sweatt v. Painter*, 339 U.S. at 634-635. This case presents no serious debate, therefore, that "[t]he proposed alternative program offers no remotely similar, let alone 'substantively comparable,' experience" to that which VMI affords men. App. 255a (Motz, J., dissenting).

First, Virginia's ostensible interest in single-gender education is a fiction. Like the law school for blacks in *Sweatt v. Painter*, 339 U.S. 629, 631-632 (1950), that was created after a trial court held that the University of Texas Law School unconstitutionally denied admission to a black student, the creation of VWIL is "a stratagem to achieve the Commonwealth's real objective -- preservation of VMI, with its 'adversative' training and culture, from the unwelcome intrusion of women." App. 253 n.3 (Motz, J., dissenting).

There is simply *no* evidence in support of the court of appeals' erroneous assumption that the purported objective of single-sex education "is the actual purpose underlying the discriminatory classification." *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 730 (footnote omitted). While the court of appeals felt that "deference is to be accorded the state's legislative will," App. 18a, this Court has consistently held that a federal court "need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) (citations omitted). *See also Mississippi Univ. for Women v. Hogan*, 458 U.S. at 728; *Califano v. Westcott*, 443 U.S. 76, 86-88 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 210-11 (1977).

VMI's history of denying admission to women is not the result of a considered analysis of the pros and cons of single-sex education. Indeed, if single-gender education were truly Virginia's goal, the Commonwealth would have devised a parallel VMI program for women long before being forced to do so by this litigation. Rather, as Judge Phillips stated in dissent, VMI's "original men-only policy . . . simply reflected the unquestioned general understanding

of the time about the distinctly different roles in society of men and women." App. 33a. VMI's continued implementation of that policy advances no legitimate state interest but rather, as discussed more fully below, perpetuates "the very sort of archaic and overbroad generalizations about women . . . found insufficient to justify a gender-based classification." *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 730 n.16.

Moreover, even if the record supported the court of appeals' conclusion that single-gender education were the true objective of VMI's discriminatory policy, as this case vividly shows, that objective is not "legitimate and important. . . ." *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 725. The admission -- and growing presence -- of women in the military and at all of the United States military academies cast considerable doubt on, if not outright refute, VMI's claim that its male-only environment is somehow necessary to achieve successful military and civilian leadership skills.

This Court has stated that "[*i*]*n limited circumstances*, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." *Id.* at 728 (emphasis added). Conversely, "[a] gender-based classification which . . . generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny." *Orr v. Orr*, 440 U.S. 268, 282-283 (1979).

Thus, the Court has upheld a statutory scheme that computed old-age insurance benefits on the basis of the wage earner's gender, because it "operated directly to compensate women for past economic discrimination." *Califano v. Webster*, 430 U.S. 313, 318 (1977). The Court has similarly approved a statute that provided female naval

officers more time than male officers to be promoted or else be subject to mandatory discharge, based on "the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service." *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (emphasis in original). Likewise, in *Kahn v. Shevin*, 416 U.S. 351 (1974), the Court upheld the validity of a property tax exemption for widows "designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden." *See also Rostker v. Goldberg*, 453 U.S. 57 (1981); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (plurality).

In contrast to the narrow exception represented by these cases, this Court has struck down gender-based classifications in virtually all of the other cases in which it has addressed such classifications in the last 25 years.[4]

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[4] *See J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419 (invalidating peremptory challenges on the basis of gender); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (exclusion of males from state-supported professional nursing school held unconstitutional); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (striking down Louisiana statute giving husband unilateral right to dispose of jointly owned property without spouse's consent); *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980) (finding unconstitutional Missouri law requiring a widower, but not a widow, to show mental or physical incapacitation to receive benefits with respect to spouse's work-related death); *Califano v. Westcott*, 443 U.S. 76 (1979) (invalidating social security statute providing AFDC benefits when deprivation of parental support is due to unemployment of the father but denying those benefits when the mother is unemployed); *Caban v. Mohammed*, 441 U.S. 380 (1979) (finding New York law violated equal protection principles in requiring an unwed mother, but not an unwed father, to consent to child's adoption); *Orr v. Orr*, 440 U.S. 268 (1979) (holding as

These decisions collectively illustrate the extreme difficulty that a governmental body faces in establishing "an exceptionally persuasive justification for its gender-based" classification. *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. at 1426. This case falls far short of the narrow exception to this Court's largely prohibitive rule governing the validity of gender-discriminatory classifications, as it presents no circumstances demonstrating that VMI's exclusion of women fulfills any legitimate governmental goal.

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unconstitutional Alabama statutes imposing alimony obligations on husbands but not wives); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (plurality) (invalidating federal statute conditioning the right of a widower, but not a widow, to receive survivor benefits on a showing that he received financial support from deceased spouse); *Craig v. Boren*, 429 U.S. 190 (1976) (equal protection denied by Oklahoma statute imposing higher age limitation on males than on females with respect to the sale of beer); *Stanton v. Stanton*, 421 U.S. 7 (1975) (striking down Utah statute requiring support payments until the age of 21 male children but only until the age of 18 for female children); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (invalidating social security statute providing benefits to a deceased's widow and minor children but not to a deceased's widower); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality) (finding equal protection violation caused by federal statute conditioning medical benefits for the spouse of a servicewoman on a showing that her spouse is dependent upon her for one-half of his support, but imposing no similar support requirement for a serviceman's spouse); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (equal protection violated by Illinois statutory scheme denying an unwed father a hearing accorded to all other parents on his fitness as a parent upon the death of his children's mother); *Reed v. Reed*, 404 U.S. 71 (1971) (holding invalid Idaho statute giving automatic preference to males over females in administering relative's estate). *See also Taylor v. Louisiana*, 419 U.S. 522 (1975) (striking down Louisiana law excluding women from jury service).

The court of appeals explicitly found that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women. . . ." App. 155a. In this case, therefore, there is no relationship between the exclusion of women and the purposes that VMI advances, as "the sex characteristic . . . bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). Simply put, VMI is no more excused in educating only members of one sex than it is in conferring educational benefits only on members of one race or national origin. *See Sweatt v. Painter*, 339 U.S. 629.

The decision below confirms that, rather than serve a legitimate purpose, VMI's refusal to open its door to women operates only to further "the State's purpose of fostering 'old notions' of role typing and preparing boys for their expected performance in the economic and political worlds." *Craig v. Boren*, 429 U.S. 190, 198 (1976) (*quoting Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975)). Stating that "[t]he classification for single-gender education at VMI is . . . directly related to achieving the results of an adversative method in a military environment," the court of appeals expressed concern that "[i]f we were to place men and women into the adversative relationship inherent in the VMI program, we would destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes." App. 23a. This sentiment "carries with it the baggage of sexual stereotypes" this Court has long condemned, *Orr v. Orr*, 440 U.S. at 283, and is based on outdated "fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 725.

The court of appeals' decision demonstrates in other ways that VMI's refusal to admit women "is another

example of 'overbroad generalizations' in gender-based classifications." *Caban v. Mohammed*, 441 U.S. at 394. As the court of appeals stated, while a "task force concluded that VMI's military model, especially the adversative method, would not be effective for women *as a group*, . . . the task force concluded that *some* women would be suited to and interested in experiencing a 'women's VMI.'" App. 8a (emphases added). The court of appeals also acknowledged "that *some* women can meet the physical standards now imposed on men," App. 146a (emphasis in original), and that "[n]o other aspect of the program has been shown to depend upon maleness. . . ." App. 152a.

It is apparent from this evidence that not *all* women would reject VMI's adversative training method, just as it is evident that not *all* women would fail to satisfy VMI's physical training requirements. In contrast, the evidence below suggested that "many men would not want to be educated in such an environment." App. 257a (Motz, J., dissenting). Yet, any man, regardless of his interest in attending VMI and his qualifications to do so, may be considered for admission to VMI while no woman may, despite her interest and abilities.[5]

As these facts strongly suggest, VMI's admissions policies "reflect out-moded notions of the relative capabilities of men and women." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985). "The Equal Protection Clause, as interpreted by decisions of this Court, acknowledges that a shred of truth may be contained in some stereotypes, but requires that state actors look

[5] Despite the fact that VMI "has never accepted applications from women," the court of appeals noted that "[d]uring the two years preceding the filing of this action, it did . . . receive over 300 inquiries from women." App. 141a.

beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination." *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. at 1427 n.11.[6] Given that VMI admissions officials already consider each applicant's qualifications (as admissions officials routinely do at other schools), VMI can easily "adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact." *Craig v. Boren*, 429 U.S. at

[6] The court of appeals cited expert testimony to justify its conclusion that men and women react differently to, and thus should not have equal opportunities to receive, adversative training. The court observed that "[t]he possibility of adapting the adversative methodology to women, setting woman against woman with the intended purpose of breaking individual spirit and instilling values, could succeed only if it is true that women, subjected to the same grating of mind and body, respond in the same way men do. . . ." App. 26a. Stating that "[e]ducational experts for the Commonwealth testified that women *may* not respond similarly," App. 27a (emphasis added), the court observed that "[t]he United States did not offer sufficient evidence to lead us to conclude that the Commonwealth's expert testimony was clearly erroneous in this regard." *Id.* Aside from erroneously placing the burden on the United States to show that the VMI and VWIL programs are *not* comparable -- "[t]he burden . . . is on those defending the discrimination to make out the claimed justification," *Wengler v. Druggist Mutual Insurance Co.*, 446 U.S. at 151 -- the court of appeals incorrectly swept aside the settled principle "that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization." *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. at 1427 n.11. As set forth above, the fact that *some* women may not respond positively to the adversative training methodology does not excuse VMI from refusing to consider *any* women for admission.

199.[7]

As in these cases, "[t]here is no reason, therefore, to use sex as a proxy. . . ." *Orr v. Orr*, 440 U.S. at 281. Instead of fulfilling any legitimate governmental interest, VMI's exclusion of women constitutes "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment." *Reed v. Reed*, 404 U.S. at 76. "Indeed, the classification . . . is in some ways more pernicious." *Weinberger v. Weisenfeld*, 420 U.S. at 645. In the last year alone, the Commonwealth of Virginia provided over $10 million in funding to VMI. App. 256a. Thus, each Virginia woman who pays taxes has been "deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others." *Weinberger v. Weisenfeld*, 420 U.S. at 645.

In denying women the right to receive what they believe to be the best military training available, VMI's exclusionary policy has the twin effect of exacerbating "disadvantageous conditions suffered by women in economic and military life," *Craig v. Boren*, 429 U.S. at 198 n.6, and perpetuating "the role-typing society has long

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[7] *See also Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. at 152 ("[T]he requisite showing has not been made here by the mere claim that it would be inconvenient to individualize determinations about widows as well as widowers."); *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) ("[I]t may be burdensome to sort out those who should be exempted [from jury service] from those who should serve. But that task is performed in the case of men, and the administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials."); *Frontiero v. Richardson*, 411 U.S. at 689-690; *Stanley v. Illinois*, 405 U.S. 645, 656-658 (1972).

imposed." *Stanton v. Stanton*, 421 U.S. at 15. Indeed, given Virginia's proposal to provide a single-gender women's institution that is "but a pale shadow of VMI," App. 50a (Phillips, J., dissenting), VMI's "admissions policy actually penalizes the very class the State purports to benefit." *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 729 n.15. *See also Califano v. Goldfarb*, 430 U.S. at 209 n.8.

Stating twenty years ago that "[c]oeducation is a fact, not a rarity," this Court in *Stanton v. Stanton* struck down a Utah statute that interfered with the right of females to receive the same "education and training" as males. 421 U.S. at 15. As was the statute in that case, VMI's exclusion of women is a relic of the past that inflicts great social harm while simultaneously serving no useful purpose. The time has come to end VMI's historic denial of equal educational opportunities to women.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN SUPPORT OF THE PETITION OF THE UNITED STATES

INTEREST OF AMICI

The *amici* are Lieutenant Colonel Rhonda Cornum, USA; Brigadier General Evelyn P. Foote, USA (Ret.); Captain Patricia Murphy Gormley, JAG, USN (Ret.); Kristine Holderied; Major Andrea Hollen, USA (Ret.); Major General Jeanne Holm, USAF (Ret.); Major Pat Walker Locke, USA (Ret.); Danna Maller; Major Lillian A. Pfluke, USA (Ret.); Lieutenant Julie M. Roberts, SC, USNR; Major Alison Ruttenberg, COANG; Mary Rosinski Whitley; Brigadier General Roger C. Bultman, USA (Ret.); Dr. Margarethe Cammemeyer; Captain (Sel.) Eileen L. O'Hickey, CHC, USN; Lieutenant Colonel Karen Johnson, USAF (Ret.); Major Jane McKeon, USA; Major Mary A. Finch, USA; and Women Active in Our Nation's Defense, Their Advocates and Supporters (WANDAS). Descriptions of the *amici* are set forth in the attached appendix.[1]

Military members, female and male alike, swear an oath to defend the very Constitution which has been construed by the courts below to deem women unworthy to attend the Virginia Military Institute ("VMI"). *Amici* appear before this Court to defend their right as citizens to equal protection under the Constitution to which they have sworn their allegiance.

SUMMARY OF ARGUMENT

In *United States* v. *Commonwealth of Virginia*, 44 F.3d 1229 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995) [hereinafter "*VMI II*"], the Fourth Circuit relied on inaccurate and harmful stereotypes of women as weak, insecure and unable to withstand the rigors of military training when it permitted the Commonwealth of Virginia to continue to exclude women from VMI.

Women, who have participated in every American armed conflict, including many of the signatory *amici curiae*, have

[1] The parties' written consent to the filing of this brief has been filed with the Court.

demonstrated with their lives that they can withstand the stress of combat situations, the challenges of military leadership and the physical challenges of mobilizing a fighting force. Yet, because of their gender, these Americans are not qualified to attend VMI.

The Fourth Circuit has adopted a view that the admission of women to VMI would have a detrimental impact on that institution. Such a view, however, contradicts available evidence. The successful integration of the United States service academies and the armed forces offers strong proof that the integration of VMI will not detrimentally affect its mission of educating "citizen-soldiers," but will be an asset to VMI.

The Virginia Women's Institute for Leadership ("VWIL") is in no respect equal, let alone comparable, to VMI. VWIL will not rely on the pervasive military life or adversative methods that characterize VMI. Rather, VWIL has been created not to benefit women who want a VMI-style education, but to maintain VMI's historic all-male character. It is essential for this Court to integrate VMI, thereby ensuring that women are afforded a truly equal educational opportunity.

ARGUMENT

When VMI was founded in 1839 as a state-supported military school, women had no legal right to equal protection of the laws. Hence their exclusion from VMI simply reflected the subordinate legal and social status of women in American society at that time. Rather than revisiting its policies in light of women's current legal and social status, VMI has chosen to retain the outmoded gender-role premises of its origins.

In contrast, both the Congress and the United States military have eliminated most gender-exclusionary policies, creating hundreds of new opportunities in the armed forces which were previously closed to women. There is no reasoned basis why VMI, an institution dedicated to creating "citizen-soldiers," should maintain a program that is more "macho" than the United States armed forces.

The fact that VMI wishes to remain all male is not a legally cognizable reason for excluding women under any level of equal protection scrutiny. VMI resists change because its guardians are unwilling to share VMI's opportunities with women. As Judge Hall stated in his concurrence in *Faulker v. Jones*, the VMI and The Citadel cases have very little to do with education:

> [t]hey instead have very much to do with wealth, power, and the ability of those who have it now to determine who will have it later. The daughters of Virginia and South Carolina have every right to insist that their tax dollars no longer be spent to support what amount to fraternal organizations whose initiates emerge as full-fledged members of an all-male aristocracy. Though our nation has, throughout its history, discounted the contributions and wasted the abilities of the female half of its population, it cannot continue to do so. As we prepare, together, to face the twenty-first century, we simply cannot afford to preserve a relic of the nineteenth.

51 F.3d 440, 451 (4th Cir.), *cert. denied*, 1995 WL 428100, *cert. denied*, 1995 WL 500529 (1995) (Hall, J., concurring).

There are women who can satisfy each and every one of VMI's current requirements and who desire to attend VMI.[2] *United States* v. *Commonwealth of Virginia*, 766 F. Supp. 1407, 1412, 1414 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993), *aff'd*, 44 F.3d 1229 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995). The courts below, by improperly focusing on stereotypes of

[2] There is a demand for a VMI education among women even though women have been discouraged from applying to VMI because of its all-male admission policy. Between 1988 and 1990, VMI received, but did not respond to, inquiries, test scores and requests for applications from 347 women. 766 F. Supp. at 1436.

women as a group,[3] denied these women the remedy to which they are entitled, the opportunity to attend VMI. After years of litigation, women who seek the VMI experience still lack a remedy.

Although *amici* believe that the reasons put forward by VMI for the exclusion of women (*i.e.*, privacy concerns, notions of equality and sexual distractions) are red herrings, this brief will address and refute these rationales.

I. THE SUCCESS OF WOMEN IN THE MILITARY INVALIDATES THE STEREOTYPES RELIED ON BY THE FOURTH CIRCUIT

The Veterans Administration estimates that there are more than 1.2 million women veterans in the United States.[4] Although official uniformed participation by women began with the formation of the Army Nurse Corps in 1901, women have contributed to the national defense since our country was founded.[5]

World War II marked a turning point in the history of women in the military. A total of 360,000 women served in the armed forces during the conflict.[6] The many military women stationed overseas endured the same arduous living conditions as men. Additionally, 68 women were held as prisoners of war by the Japanese for more than three years.[7] In

[3] A woman attends military school or serves in the armed forces, "not as a representative of a . . . sexual group but as an individual citizen." *J.E.B.* v. *Alabama*, 114 S. Ct. 1419, 1435 (1994) (Kennedy, J., concurring).

[4] Scott Shepard, *Americans May Be Losing Touch With Veterans' Sacrifices*, Hous. Chron., Nov. 11, 1995, at 3.

[5] James D. Milko, *Beyond the Persian Gulf Crisis: Expanding the Role of Servicewomen in the United States Military*, 41 Am. U. L. Rev. 1301, 1337 (1992).

[6] Jacquin Sanders, *Veterans Day Salute to Women*, St. Petersburg Times, Nov. 11, 1995, at 1A.

[7] *Id.*

1947-48, women assumed active duty status in the Army, Navy, Marine Corps and Air Force. Women continued to play an active role in Korea and Vietnam. In 1975, the service academies first opened their doors to women; in 1980, the first women cadets and midshipmen graduated.[8]

Since 1973, when the male draft ended and the All Volunteer Force began, the percentage of women among U.S. military personnel has increased dramatically, from 1.6 percent in 1973, to 8.5 percent in 1980, to 12.0 percent in 1994. Currently, almost 200,000 women serve on active duty in the military services, with 32,338 serving as officers.[9]

Recent significant changes in law and policy have eradicated barriers which had previously impeded women's military service.[10] In November 1993, Congress repealed Title 10 U.S.C. § 6015, which had prohibited Navy and Marine Corps

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[8] Six of the *amici* were members of the class of 1980: Major Andrea Hollen, USA (Ret.); Major Pat Locke (Ret.); Danna Maller; Major Lillian Pfluke (Ret.); Major Jane McKeon, USA; and Mary Rosinski Whitley.

[9] U.S. Department of Defense, Office of the Assistant Secretary of Defense, Public Affairs News Release no. 449-94, *Positions and Occupations Open To Active Duty Women By Service, As Of October 1, 1994*, July 29, 1994.

[10] The VMI litigation is about equal opportunity for qualified individuals. The United States military has opened arbitrarily closed doors to all those who are most qualified including women. As *Amicus* Major Rhonda Cornum has written:

> Everyone should be allowed to compete for all available jobs, regardless of race or gender. There is no question that the "average" woman is not as tall, heavy or strong as the "average" man; . . . . But what does that mean? I'd say that it means if the job requires someone to be tall, heavy and strong, then fewer women will be competitive than men. But at least let them compete. Who cares what percentage qualifies?- just pick the best. . . . The qualities that are most important in all military jobs -- things like integrity, moral courage, and determination -- have nothing to do with gender.

Major Rhonda Cornum, *She Went to War* 198 (1992) (emphasis added).

women from serving on combatant vessels. Similarly, the Congressional repeal of limiting statutes in 1991 enabled the Secretary of Defense in 1993 to direct the services to allow women aviators to fly aircraft engaged in combat missions. In a 1993 memorandum to the Secretary of Defense, Secretary of the Air Force Shelia Widnall[11] noted that "99.1% of all Air Force career fields are open to women as well as 99.7% of our positions."[12]

In late 1994, Secretary of the Army, Togo West, outlined increased opportunities for women in the Army, stating that:

> [e]xpanding professional roles for women in the Army not only mirrors changes in our society -- but more importantly it reflects changes in the conduct of war, which has evolved from a contest of strength of individual combatants, to a contest in which a far wider variety of skills contribute to victory. The nature of the modern battlefield is such that we can expect soldiers throughout the breadth and depth of a theater of war to be potentially in combat.[13]

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[11] In 1993, Secretary Widnall became the first woman appointed as head of a branch of the U.S. military. Monica Fountain, Special to the Tribune, *Flying High as Air Force Secretary She's Tops in Her Field and an Inspiration*, Chi. Trib., Sept. 24, 1995, at 10.

[12] Memorandum from Sheila Widnall, Secretary of the Air Force, on Direct Ground Combat Definition and Assignment Rule (June 21, 1994) (Defense Secretary Aspin's Policy on the Assignment of Women in the Armed Forces, Tab D).

[13] Memorandum from Togo West, Secretary of the Army, on Increasing Opportunities For Women In The Army (July 27, 1994) (Defense Secretary Aspin's Policy on the Assignment of Women in the Armed Forces, Tab B).

Similarly, Secretary of the Navy John Dalton recently reaffirmed his "commitment to expanding opportunities for women in the Department of the Navy."[14]

Increased opportunities for women in the armed forces has had a positive effect on military readiness; women have played critical roles in recent military campaigns. In 1983, 170 women were deployed with forces to Grenada in Operation Urgent Fury.[15] In 1986, Air Force women served as pilots, co-pilots and boom operators on the KC-135 and KC-10 tankers that refueled FB-111s during the raid on Libya.[16] In 1989, 770 women were deployed to Panama in Operation Just Cause, where Captain Linda Bray, commander of the 988th Military Police Company, led her soldiers in an infantry-style firefight against Panamanian Defense Forces.[17] Three female Army pilots were nominated for Air Medals after their helicopters encountered heavy enemy fire over Panama.[18]

The Persian Gulf War was a watershed event for women in the United States military. The women who served in Operation Desert Storm performed their duties in an outstanding manner, including jobs that were, for all practical purposes, combat jobs.[19] Like all American soldiers, they faced hostile fire; flew into enemy territory; suffered death, injury and confinement as prisoners of war; lived in conditions of

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[14] Memorandum from John H. Dalton, Secretary of the Navy, on Direct Ground Combat Definition and Assignment Rule (April 29, 1994) (Defense Secretary Aspin's Policy on the Assignment of Women in the Armed Forces, Tab C).

[15] Women in Military Service for America Memorial Foundation, Inc., *Highlights of Women in the United States Armed Forces* 5 [hereinafter "*Highlights*"].

[16] *Id.*

[17] *Id.*

[18] *Id*

[19] The Presidential Commission on the Assignment of Women in the Armed Forces, *Report to the President Women in Combat*, iii (1993).

extreme hardship; and performed tasks requiring physical strength and stamina.

Over 40,000 United States military women served in key combat-support positions throughout the Gulf.[20] They performed in medical and administrative jobs, as well as non-traditional assignments, including airlifting supplies and personnel, maintaining weapons systems and serving as intelligence specialists.[21] Women accounted for six percent of the U.S. forces in the Gulf region. Five women were killed in combat and two were taken prisoners of war.[22]

Since the Gulf War, military women have continued to make great strides. In 1993, an Army woman astronaut flew on the space shuttle *Endeavor*, American servicewomen served with the United Nations' forces in Bosnia and Somalia, and women were deployed with the *USS Fox*. *Highlights, supra*, at 5. In 1994, Navy women joined the crew of the *USS Eisenhower*, a female Air Force major co-piloted the space shuttle *Discovery*, American servicewomen were deployed with the United Nations' forces to Rwanda, and Navy women were deployed on combat ships to Haiti and the Middle East. *Id.* In 1995, Air Force Lt. Col. Eileen M. Collins became the first woman pilot of the space shuttle *Discovery*. *Id.*

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[20] *Id.*

[21] 137 Cong. Rec. E2375 (daily ed. June 26, 1991).

[22] *Id.* One of the female POW's, Major Rhonda Cornum, was on a search-and-rescue mission when the Army helicopter in which she was flying was shot down in southeastern Iraq. Major Cornum suffered two broken arms, had a bullet enter her right shoulder and seriously injured her knee. Vice Admiral William P. Lawrence, former Superintendent of the U.S. Naval Academy, has stated that Major Cornum's "performance both before and during the war and captivity fully validates that women can be warriors in every sense of the word and [that] they are a vital part of today's armed forces." Cornum, *supra*.

II. WOMEN WILL NOT "DESTROY" THE VMI EXPERIENCE

Integrating women into VMI will not destroy the experience that institution provides for cadets. It will only end the unconstitutional exclusion of women from a stated-supported program designed to train "citizen-soldiers."[23]

The Fourth Circuit rationalized its exclusion of women from VMI on the grounds that the military model is "inappropriate" for educating and training most women. The court failed to explain, however, how this determination squares with the concrete real-life success of women in the armed forces and in the service academies, all of which employ a military model. The court did not give weight to the twenty-plus years of existing evidence that the integration of women into the United States service academies, such as West Point and the Naval Academy, has been positive.[24] Although real differences do exist between the sexes, many of

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[23] Change does not divest an institution of its uniqueness or prestige. The admission of women to the University of Virginia did not rob that school of its status as the most prestigious university in the state. Integration would change VMI, but it would remain unlike any other college in Virginia. Bennett L. Saferstein, *Note: Revisiting Plessy at the Virginia Military Institute: Reconciling Single-Sex Education with Equal Protection*, 54 U. Pitt. L. Rev. 637, 668 n.150 (1993).

[24] Women gain entrance to West Point based on merit, not because of a quota. Women admitted are fully qualified to be cadets; they are not replacing better-qualified men. They are achieving standards of excellence comparable to those of men by every measure of comparison. Women's academic performance at West Point has been outstanding. Militarily, women are earning cadet rankings consistent with their representation in the Corps. Performance of women in the physical program compares quite favorably with that of men, whether it is in physical education classes, during fitness tests or in competitive athletics. West Point's women graduates' selection, promotion, and retention rates exceed Army norms and are setting the standard for others to emulate. The United States Military Academy, *Report on the Integration and Performance of Women at West Point for the Defense Advisory Committee on Women in the Services* 8, 63, 64 (Feb. 1992) [hereinafter "*DACOWITS Report*"].

the stereotypes relied on by the majority below are premised on the idea that only women (and not men) require a nurturing and supportive environment and that women can only learn in this environment. The outstanding achievements of women at the service academies rebuts these unsupported assumptions.[25]

Contrary to the claims of VMI's proponents, the admission of women to VMI will not alter VMI's mission of educating "citizen-soldiers" or destroy the development of *esprit de corps*.[26] It may, however, eliminate particular rituals followed to achieve those ends -- rituals that are neither a necessary component of military education nor very logical in their own right.[27]

A. VMI's Use of Hazing As an Educational Tool Cannot Justify the Exclusion of Women

One of the main justifications for the blanket exclusion of women from VMI is the institution's dedication to the use of hazing, or the extreme adversative methodology, as a fundamental educational tool. That simply cannot stand as a valid basis for the exclusion of women. Hazing is an abusive method of imposing stress on cadets, but it is an artificial

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[25] All of the service academies have had women graduate at the top of their class. In 1984, *amicus* Kris Holderied graduated first at the U.S. Naval Academy. In 1980, *amicus* Major Lillian Pfluke (Ret.) graduated first in physical education at West Point.

[26]

> People talk about male bonding in the military and about how female soldiers will disrupt unit cohesion. Real bonding, however, goes far beyond whether the people involved are two men, two women, or one of each. It's much more than that. Going to war with a unit, risking your life with them, builds an intimate and intense relationship. The soldiers don't all have to be men for that to happen.

Cornum, *supra*, 84.

[27] Mary M. Cheh, *An Essay on VMI and Military Service: Yes, We Do Have to be Equal Together*, 50 Wash. & Lee L. Rev. 49, 53 (1993).

stress, not a real-life or combat-type stress. VMI has failed to show there is a substantial relationship between its goal of producing "citizen-soldiers" and the means exercised to fulfill this objective. As evidenced by the service academies, training future leaders can be accomplished without the use of adversative training.

Academic and military institutions have recognized that hazing is counterproductive and have eliminated its use.[28] At the only other all-male publicly-funded military school, The Citadel, four freshmen athletes quit in 1991, alleging they had been hazed. The upperclassmen responsible for the harassment were rigorously punished and The Citadel stated it would review its system of freshmen training, which is similar to VMI's rat line.[29] VMI cannot justify cadet hazing as either a recognized educational method or appropriate military training.

Even VMI admits that different methodologies produce the same results, so hazing cannot be fundamental to its educational mission. As Judge Motz found, "if hazing is truly fundamental, then VWIL is not equal; if it is not fundamental, then VMI cannot rely on it to exclude women." *United States* v. *Commonwealth of Virginia*, 52 F.3d 90, 93 (4th Cir.) (Motz, J., dissenting from denial of rehearing en banc), *cert. granted*, 116 S. Ct. 281 (1995).

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[28] Congress outlawed hazing at the Naval Academy in 1976, having defined hazing as "any unwarranted assumption of authority by a midshipman whereby another midshipman suffers or is exposed to any cruelty, indignity, humiliation, hardship, or oppression, or the deprivation or abridgement of any right." 10 U.S.C. § 6964 (1988). Hazing was abolished at West Point in 1990, banned at The Citadel and is illegal in 30 states. Bruce Smith, *Watchdog Says Campus Harassment by Upperclassmen Has Declined*, Assoc. Press, Oct. 21, 1991.

[29] Smith, *supra*.

B. Creating Parallel Physical Fitness Requirements Will Not Destroy the Cadet Experience

The *amici* agree that women and men differ physiologically. As evidenced by the experiences of the service academies, these differences can be worked into the program to the minimal extent necessary to ensure that women and men perform to the limits of their respective abilities.[30]

The underlying goal of the rigorous physical fitness requirements at any military academy is to drive cadets to extend themselves and thereby ascertain their personal maximum capabilities. Parallel physical standards will not disturb this goal because the standards are designed to test the utmost efforts of the cadets regardless of their gender.[31] Rather than finding that modifying the physical education requirements would destroy VMI, the court should have utilized the evidence from the service academies which demonstrates that a dual track for physical education requirements would not significantly alter VMI's mission. At West Point, women's physical standards are quite demanding and women are performing exceptionally against these standards. *DACOWITS Report*, *supra*, at 45.

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[30] At the service academies, gender-based differentiation occurs in the physical fitness programs because of physiological differences. Changes in all programs, however, have been held to a minimum. This is particularly true in the academic and military programs. *DACOWITS Report*, *supra*, at 63.

[31] Some women can meet the physical requirements now imposed on the men at VMI, *United States* v. *Commonwealth of Virginia*, 976 F.2d 890, 896 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993), *aff'd*, 44 F.3d 1229 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995) [hereinafter "*VMI I*"], and many more would be able to meet the strenuous standards that could be imposed in an integrated VMI.

C. Provisions for Some Degree of Privacy Could be Made Without Detriment to the Adversative Methodology

VMI utilizes constant public exposure of cadets as one means of inducing stress and claims that locks installed on doors and shades on windows might lessen that stress. Creating a separate barracks floor for women could maintain the source of stress for men and impose the same stress on the women vis-a-vis other women.

Making accommodation for women at the service academies was not difficult and did not affect the overall programs. For example, at West Point, all cadets live in the barracks. Rooms for men and women are interspersed throughout the area; there are no barracks specifically for men or women. Cadets live two or three to an austerely arranged room. Although some barracks have two bathrooms per floor, in other barracks there is only one small bathroom per floor. In these cases, cadets have solved the problem by either alternating the bathrooms (women/men) between floors or by merely putting a rotating ("women"/"men") sign on the door.[32] *DACOWITS Report*, *supra*, at 17. Implementing minimal basic regulations regarding privacy would not substantially interfere with the adversative method or the spartan lifestyle.

D. VMI's Apprehension Concerning the Effects of Cross-Sex Relationships is Specious

If VMI is claiming a military mission, it should be preparing its cadets to cope with the realities of a mixed gender military.[33] If VMI's purpose is to train leaders in the community, it should be training its cadets to function in a

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[32] At the Naval Academy, women live alongside the men in Bancroft Hall in company areas. Midshipmen live two to three to a room. Most company areas have at least one male and one female bathroom. Midshipmen have a shower stall and sink in their rooms.

[33] Saferstein, *supra*, at 663.

mixed-gender social and political world. A coeducational VMI experience would provide better training for military service, 766 F. Supp. at 1441, as well as for leadership in both the business and political arenas.

VMI takes pride in the self discipline developed by cadets through its rigorous training program. This self discipline should enable the cadets to control themselves irrespective of "sexual distractions." Additionally, if fear of "sexual distraction" were a valid reason for excluding women from public higher education, women would still be barred from all public colleges and universities.

Regulations concerning fraternization could be implemented to maintain good order and discipline within ranks. The court noted without elaboration that the introduction of women to VMI would create a "new set of stresses on the cadets." 766 F. Supp. at 1413. VMI has emphasized that mental stress is a key component of its adversative program, so any added stress might actually harmonize with this program goal.[34]

E. VMI Has Changed and Accommodated New Student Populations With Which the Admission of Women is Consistent[35]

In its first opinion upholding the exclusion of women from VMI as consistent with the Equal Protection Clause, the district court began with a reference to the Civil War Battle of New Market in which ten VMI cadets died in service to the Confederacy. 766 F. Supp. at 1408. Ceremonies commemorating this battle were the impetus for significant changes in

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[34] *Id.* at 662.

[35] VMI was once open only to Virginians; it was once open only to white males. For a discussion of VMI's tradition of discrimination and accommodation of difference, see Dianne Avery, *Institutional Myths, Historical Narratives, and Social Science Evidence: Reading the "Record" in the Virginia Military Institute Case*, 5 S. Cal. Rev. L. & Women's Studies (forthcoming in 1996) (manuscript on file with counsel).

VMI's tradition of race discrimination when VMI modified its racially exclusionary admissions policy to allow African-American men to attend.[36]

After *Brown* v. *Board of Education*, 347 U.S. 483 (1954), VMI devised ingenious tactics to forestall the admission of black cadets. In 1956, VMI altered its regulations on "the physical qualifications for admission," adding a new screening process for applicants whose qualifications might be in question.[37] The added screening procedure, maintained until 1963, "was a fairly transparent attempt to make sure that no blacks coming out of newly desegregated public schools slipped through the admissions process."[38]

The first black cadets were admitted to VMI in 1968.[39] At that time, VMI had traditions such as the "customary salute" of the chapel in Lexington where Robert E. Lee is buried and the requirement that all cadets sing "Dixie" and salute the confederate flag at the annual New Market ceremony.[40] In 1971, black cadets refused to pay their respects during the New Market ceremonies. The next year, in violation of regulations and breaking tradition, black cadets boycotted the event entirely. The Board of Visitors did not relent until 1974[41] when VMI finally abandoned these traditions of its

[36] Until after the Civil War, VMI included slaves among its property holdings. *See id.* at 17 & n.1 (citing William Couper, *One Hundred Years at V.M.I.* 290 (1939); Jenning C. Wise, *The Military History of the Virginia Military Institute From 1839-1865* 371 (1915)).

[37] Henry A. Wise, *Drawing Out the Man: The VMI Story* 287 (1978).

[38] Avery, *supra*, (manuscript at 19). VMI's resistance to racial integration of its student body is also "reflected in a 1962 decision of the Board of Visitors to refuse donations from philanthropic organizations, such as the Ford Foundation, which would contribute funds only to racially integrated colleges." *Id.* (citing Wise, *supra*, at 287).

[39] Wise, *supra*, at 287.

[40] Avery, *supra*, (manuscript at 20).

[41] Safeistein, *supra*, at 661.

slaveholding past to accommodate its newly diversified student body.[42]

Admitting black cadets required VMI to transform itself in a fundamental way because as one of VMI's historian's noted "the negro heritage and some of VMI's traditions of 100 years and more are mutually incompatible."[43] Yet, "racial integration came to be seen as yet another manifestation of the Institute's faithfulness to its core ideals,"[44] because once an individual becomes a VMI cadet, the individual's "background, name and circumstances do not count."[45] The admission of women would be similarly faithful to the Institute's core ideals.

VMI not only "survived" racial integration; today VMI encourages it. VMI has created special programs and allocated additional funds to recruit and retain African-American male students.[46] 766 F. Supp. at 1436-37. Since such affirmative action programs do not contravene VMI's definition of equality, any tangential changes needed to accommodate women would similarly not effect the equal treatment of cadets.

VMI's core mission of educating "citizen-soldiers" also appears malleable given that VMI has a history and current day practice of admitting foreign students.[47] Foreign students

[42] Avery, *supra*, (manuscript at 20).

[43] Wise, *supra*, at 289.

[44] Avery, *supra*, (manuscript at 21).

[45] *Id.* (quoting Wise, *supra*, at 289).

[46] VMI's 1990-91 budget included $22,000 set aside for a program on "Retention of Black Cadets" designed to offer "crucial academic support" and "social-cultural support" to "minority members of a dominantly white and tradition-oriented student body." 766 F. Supp. at 1436-37.

[47] In the 1993-94 school year, VMI enrolled 36 foreign students from twelve countries. "Geographical Distribution Corps of Cadets," *VMI 1994-95 Catalog.* Chinese citizens were admitted for the first time in 1905. Students from other Asian countries, South and Central America, Europe and Canada have attended VMI. In 1975-76, VMI "coordinated

(Footnote continued)

were accommodated through the provision of English language instruction, alteration of the "rat punishment," and waiver of the ROTC requirement.[48]

In 1970, VMI Superintendent George Snell wrote:

> Changes have been made, many of them more rapidly than some would wish and others less speedily than their advocates urged. While many have regarded the changes as "chipping away at the very foundations" of the Institute, they usually have been changes that were demanded by the times and which will have long-range benefits for the Institute and its cadets.[49]

So too the admission of women is demanded by the times and will benefit women, the Institute, and all cadets.

III. VWIL FAILS TO PROVIDE WOMEN AN EDUCATIONAL OPPORTUNITY EQUAL TO THAT PROVIDED TO MEN AT VMI

Both courts below conceded that VWIL does not provide an educational opportunity equal to VMI.[50] *United States v. Commonwealth of Virginia*, 852 F. Supp. 471, 475 (W.D. Va. 1994); *VMI II*, 44 F.3d at 1237. VMI is "absolutely unique," providing men with "rigorous military training" available at no other institution in the nation, 766 F. Supp. at 1413-14; "women have no opportunity anywhere to gain the benefits of this education." *Id.* at 1421. VMI, the Commonwealth and the courts below believe that attendance at VMI provides its

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with the Royal Iranian Navy to enroll thirty Iranian midshipmen for the 1975-76 session." Avery, *supra*, (manuscript at 22-23).

[48] *Id.*

[49] Avery, *supra*, (manuscript at 33).

[50] *Amici* do not contend and affirmatively reject that separate but equal is an appropriate equal protection standard. *See Brown* v. *Board of Education*, 347 U.S. 43 (1954).

graduates with a competitive advantage in terms of military success, an advantage denied to women.

Graduates of VWIL will neither receive a VMI equivalent training nor the VMI competitive advantage for success in the military or civilian life. Participation in VWIL is more analogous to choosing an undergraduate major or being a member of a varsity sports team than it is to a VMI education. Indeed, the court of appeals noted that VWIL is essentially the standard Mary Baldwin bachelor of arts program, with a "minor" in leadership. *VMI II*, 44 F.3d at 1234.

A. VWIL Rejects The Military Education Model

VWIL has been created out of whole cloth for the ostensible purpose of training women to serve as officers in the armed forces.[51] 852 F. Supp. at 476. Yet, this training is to be provided by a private women's college which has explicitly rejected the military model as inappropriate for "educating and training most women," *id.*; which has no experience or tradition of military training or service; and whose students have shown little or no interest in the military.[52] The district court suggested that VWIL's failure to provide "the entirely militaristic experience of VMI" was excusable because VWIL was "planned for women who do not necessarily expect to pursue military careers." *Id.* at 478. That is an invalid distinction because "VMI has gone to considerable lengths to assure the public that it is not simply a military college," 766 F. Supp. at 1432, and VMI, too, is designed for men who do not

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[51] "VWIL will be a publicly-supported, single-sex education program with military training for women." 852 F. Supp. at 494. "The stated mission of VWIL is to produce citizen-soldiers . . . qualified to serve in the armed forces." *Id.*

[52] "Mary Baldwin College is not a military school. . . [and] has no tradition of producing military leaders, or of training its students for the military." 852 F. Supp. at 501. Mary Baldwin has not previously provided ROTC on campus and has had only one of its students participating in ROTC off campus. *Id.*

necessarily expect to pursue military careers.[53] Moreover, while VMI provides military-type education to men, VWIL provides only "special leadership training to women." *VMI II* 44 F.3d. at 1237.

VWIL is not organized under the "pervasive military regimen that exists at VMI" and does not use "pervasive military life and adversative methods to achieve its goals."[54] *VMI II*, 44 F.3d at 1234. Women at VWIL will not be subject to military-style regulations and are not required to wear their uniforms other than during ROTC or Virginia Corps of Cadets activities. 852 F. Supp. at 495. In contrast, VMI students are subject to "comprehensive regulation of behavior and the wearing of uniforms." 766 F. Supp. at 1424. The only military training received by women at VWIL will be ROTC, 852 F. Supp. at 497, while VMI's military training permeates all aspects of a cadet's college life.

B. VWIL Does Not Offer the Type of Science, Math and Engineering Curriculum Available at VMI

Science and engineering are so integral to VMI's academic program that they are mentioned specifically in VMI's mission statement. 766 F. Supp. at 1425. VMI offers a bachelor of science degree, *id.* at 1424, "an engineering degree [and] several advanced math and physics courses that VWIL does not offer." 852 F. Supp. at 477. VMI students also have scientific research opportunities at the VMI Research Laboratory, a

[53] "Only about 15% of VMI cadets enter career military service." 766 F. Supp. at 1432.

[54] As Captain Tamara Frezell testified, women interested in attending college in a military environment will not be interested in VWIL: "I felt that living in the military environment and attending a school that had a rigorous military program was the best preparation for a career in the Army. . . . I preferred living in a military type environment, and a ROTC program would not have satisfied my desire to study in the practice for the military." Tr. at 990.

private non-profit corporation.[55] Mary Baldwin does not offer a bachelor of science degree, does not offer engineering on campus,[56] and does not have a math or science focus. This lack of access limits the career choices, military and civilian, of VWIL students. VMI students' choices are not similarly confined. The district court, relying on a stereotype that women are not interested in science, math and engineering, simply found that women need not be given this opportunity. *Id.* at 477.

C. VWIL Does Not Offer the Opportunities for Group Identification and Cohesion Available at VMI

At VMI, there is only one educational program and all students are a part of it. "VMI's faculty and facilities are dedicated completely to the success of the program. VMI's resources are invested solely in this program; the one and only objective with which the entire VMI community is concerned is developing leaders, citizen-soldiers."[57] Thus, a VMI student in all aspects of his education will be with students engaged in the same "citizen-soldier" enterprise.

For VWIL students, that clearly will not be the case. Mary Baldwin is primarily concerned with providing a liberal arts education to its non-VWIL student body. VWIL students are a small minority of the larger student population. Their experiences in VWIL are but a minor part of their overall educational experience as Mary Baldwin students. VWIL students will attend classes, play sports, share living quarters and meals and spend leisure time with Mary Baldwin students

[55] *VMI 1994-95 Catalog.*

[56] In order to obtain an engineering degree, VWIL students have to attend another university entirely. 852 F. Supp. at 503. The courts below approved the remedy which required VWIL students to go to St. Louis for engineering school where they would lose the benefit of state funding. *Id.* at 494, 503.

[57] Julie M. Amstein, *United States v. Virginia: The Case of Coeducation at Virginia Military Institute*, 3 Am. U. J. Gender & Law 69, 99 (1994).

who have nothing whatsoever to do with ROTC, leadership classes or the like. In contrast to VMI students who at all times and in all situations are part of the Corps of Cadets, VWIL students are intended to blend in with the non-military Mary Baldwin population; they will not experience being part of a distinct and cohesive military community.[58]

D. VWIL Does Not Offer the Type of Leadership Opportunities That Are Available at VMI

Leadership development is part and parcel of all aspects of the VMI student's educational experience. VWIL students, however, primarily focus on learning leadership through classroom study in "core and elective courses," *VMI II*, 44 F.3d at 1234, with only limited opportunities for the exercise of actual leadership in peer group situations.[59] The opportunities for leadership available at VWIL are essentially those available to other Mary Baldwin students.[60]

VWIL's leadership program lacks the gender integration of the military or the service academies -- there are no men as peers or subordinates. As Virginia resident and West Point graduate Captain Frezell testified, in terms of military training, the absence of men from Mary Baldwin "was a minus for me . . . [b]ecause I wanted to study in a program that was integrated because I knew that the military was a male-dominated organization and I wanted that exposure to men." Tr. at 983, 1000. In the military and service academies, as

[58] The courts below emphasized that VMI's educational program functions holistically, with all of the individual components such as military training and academics "integrated into a unified experience through the barracks life." 766 F. Supp. at 1422. Because VWIL simply cobbles together pre-existing Mary Baldwin requirements with VWIL leadership activities, VWIL students will be denied this holistic military experience.

[59] Classroom leadership activities include the VWIL seminar and a Leadership Speaker Series for two semesters. 852 F. Supp. at 477.

[60] The VWIL leadership externship is simply a slight modification of the pre-existing Mary Baldwin externship requirement. 852 F. Supp. at 500.

well as in the business world, leadership is learned and practiced in an integrated environment where women give orders to men and discipline men, as well as *vice versa*.

"[T]he most important aspects of the VMI educational experience occur in the barracks. The barracks, therefore, are crucial to the VMI experience" and "[a]ll cadets are required to live in the barracks for all four years at VMI." 766 F. Supp. at 1423. "[R]esidential life for VWIL students will vary significantly from the residential life of VMI students." 852 F. Supp. at 477. While there is separate VWIL housing, VWIL students need only live there for two of their four years. *Id.* Even during the time VWIL students are required to live together, the "VWIL House will not be operated on a military format." *Id.*

At VMI, students put their classroom lessons of leadership, honor and teamwork to practice in the barracks living situation. The barracks is "the center of campus life and reflects many of the educational objectives of the institution." 766 F. Supp. at 1423. Because women at VWIL need not live together as a unit for half of their education, the type of "hands-on" lessons deemed so valuable in "leadership, honor and teamwork" are intentionally omitted from the program.[61]

E. Mary Baldwin Does Not Offer the Important Intangible Benefits Available to VMI Students

In what Judge Motz rightfully characterized as "an almost epic understatement," 52 F.3d at 93 (Motz, J., dissenting), the Fourth Circuit acknowledged that a degree from Mary Baldwin "lacks the historical benefit and prestige of a degree

[61] Even the sports in which VWIL students are required to participate will minimize the opportunities for team work and the exercise of leadership skills. VWIL requires students to play tennis, golf, and racquetball, all of which are essentially individual sports, requiring no team work, 852 F. Supp. at 495, unlike other sports which require team members to work together to accomplish their goal.

from VMI." *VMI II*, 44 F.3d at 1241. The contrast between VWIL and VMI "is so palpable as not to require detailed recitation." *Id.* at 1250 (Phillips, J., dissenting). As merely "a pale shadow" of VMI, VWIL obviously lacks "the intangibles such as prestige, tradition, and alumni influence which the Supreme Court . . . in *Sweatt* thought 'more important' even than tangible resources." *Id.* (citing *Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950)). Mary Baldwin's tangible resources are also "a pale shadow" of VMI's.[62] VWIL students and graduates will always be at a disadvantage in comparison to VMI graduates. "The catch-up game is an impossible one, as any honest reflection upon the matter must reveal." *VMI II*, 44 F.3d at 1250 (Phillips, J., dissenting).

CONCLUSION

For the reasons discussed above, *amici* urge the Court to find that equal protection requires that women be admitted to VMI.

Respectfully submitted,

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[62] For example, Mary Baldwin "maintains a faculty holding significantly fewer Ph.Ds than the faculty at VMI." 852 F. Supp. at 502. Mary Baldwin has an endowment of approximately $19 million while "VMI has the largest endowment on a per student basis than any other undergraduate institution in the nation - $131 million." *Id.* at 503. Mary Baldwin's physical training facilities (*e.g.*, one basketball court likened to a high school gym) are clearly inferior to those of VMI (*e.g.*, four basketball courts with television hookups and seating for 5,000 spectators). *Id.*

APPENDIX

APPENDIX

Lieutenant Colonel (LTC) Rhonda Cornum, USA

LTC Cornum graduated from medical school at the Uniformed Services University of the Health Sciences in 1986 and completed a General Surgery internship at Walter Reed Army Medical Center in 1987. Assigned to Fort Rucker, Alabama, LTC Cornum served as Chief of Primary Care and Community Medicine, then as Chief of Aviation Medicine. In 1989, she headed the Crew Life Support Branch of the U.S. Army Aeromedical Research Laboratory until deploying to Saudi Arabia with the 2-229 Attack Helicopter Battalion in August, 1990. While performing a combat search and rescue mission, during Desert Storm, LTC Cornum's helicopter was shot down in southeastern Iraq killing five of the eight crew members. LTC Cornum suffered two broken arms, a gunshot wound, and a serious knee injury. She and the two other survivors were captured and held as prisoners of war until their repatriation on March 6, 1991.

Following her return from the Persian Gulf, LTC Cornum continued her military studies at the Air Command and Staff College, graduating in 1993. She was promoted to Lieutenant Colonel in September, 1993, and is currently a resident in Urologic Surgery at Brooke Army Medical Center, San Antonio, Texas.

Brigadier General Evelyn P. Foote, USA (Ret.)

Brigadier General Foote received her commission by direct appointment in 1960. Among other military schools, she attended the United States Army Command and General Staff College, and the United States Army War College.

Brigadier General Foote culminated her military career by serving as Commanding General of Fort Belvoir, Virginia. Prior to this she held many positions, including Deputy Inspector General (Inspections), Department of the Army, commander of the 2d Basic Training Battalion, and Commander, 42d Military Police Group, United States Army Europe and Seventh Army. General Foote served with the

Information Office at Headquarters, U.S. Army Vietnam in 1967 and, upon return to the United States, assumed the duties of Executive Officer, Women's Army Corps Branch with the Officer Personnel Directorate. She was also assigned to the Office of the Deputy Chief of Staff for Personnel as the WAC Staff Advisor and Executive Officer, Human Resources Directorate.

Awards and decorations which General Foote has received include the Distinguished Service Medal, the Legion of Merit (with Oak Leaf Cluster), the Bronze Star Medal, the Meritorious Service Medal (with 2 Oak Leaf Clusters), the Army Commendation Medal (with Oak Leaf Clusters), and the Army General Staff Identification Badge.

Captain Patricia Murphy Gormley, JAG, USN (Ret.)

Captain Gormley was commissioned as a Second Lieutenant in the U.S. Marine Corps in 1963. She received her Juris Doctor from The Columbus School of Law of the Catholic University of America, Washington, D.C., in 1966 and graduated from the National War College in 1987.

Captain Gormley served in Southeast Asia during the Vietnam conflict as well as at Camp Lejeune, North Carolina; Washington, DC; and San Francisco, California; and attained the rank of Major. Gormley had various duty assignments including Foreign Claims Commissioner (Okinawa) and, special court-martial judge (the first woman lawyer in the Marine Corps to so serve).

In 1972, Captain Gormley transferred to the Judge Advocate General's Corps of the United States Navy. She was the first legal advisor to the Defense Advisory Committee on Women in the Services (DACOWITS), an advisory body to the Secretary of Defense. She served as Commanding Officer to the Naval Legal Service Office in Washington, DC (the first woman JAG Corps officer to hold command). She ended her military career as Special Assistant for Legal and Legislative Affairs to the Naval Inspector General.

Captain Gormley retired from the Navy in 1990 and became Counselor to the Inspector General of the Department of Veterans Affairs. She was then appointed General Counsel of the Federal Emergency Management Agency. In the private sector, she held the position of Director of the Women in the Military Project of the Women's Research and Education Institute, Washington, D.C. Gormley serves on the Standing Committee for Armed Forces Law of the American Bar Association. Captain Gormley's awards and honors include Meritorious Service Award; Legion of Merit; Meritorious Service Medal (two awards); the National Defense Service Medal and the Expert Pistol Medal.

Kristine Holderied

Kristine Holderied graduated from the United States Naval Academy in 1984, in the fifth class to include women in the Brigade of Midshipman. While at USNA she held several leadership positions, including the second highest position, Deputy Brigade Commander, in her senior year. Holderied graduated at the top of her class, and was the first woman to do so at any of the service academies. This ranking is determined by a combination of academic grades, military performance, physical fitness, and demonstrated leadership. At the time of graduation she was selected for one of the prestigious National Science Foundation Graduate Fellowships, for postgraduate education. Following an assignment to Spain as a naval oceanography officer, Holderied was selected by then Secretary of the Navy, John Lehman, for a new graduate education program at the Massachusetts Institute of Technology/Woods Hole Oceanographic Institution. There, she completed a master's degree in 1988 and was assigned to duty in Norfolk, Virginia. Holderied left active duty in 1991 and has been working as an environmental analyst for the U.S. Army Corps of Engineers and pursuing a doctorate in oceanography. Since 1991 she has been a resident of the Commonwealth of Virginia.

Major Andrea Hollen, USA (Ret.)

Major Hollen graduated from the United States Military Academy at West Point in 1980 with a B.S. in General Engineering. Hollen graduated as a Distinguished Cadet, ranked tenth in her class, and was commissioned in the U.S. Army Signal Corps. Her military schooling includes Jungle Operations Warfare School and Airborne School. From 1980 to 1982, Hollen attended Oxford University as a Rhodes Scholar.

Hollen served as the Division Artillery Communications Platoon Leader, the Signal Battalion Operations Officer for Plans, and the Company Commander of A Company, 123d Signal Battalion, with the 3rd Mechanized Infantry Division in Europe. Her duties included engineering and controlling division communication networks, leading over 200 soldiers in providing communication facilities for division command posts and controlling Nuclear Release Authentication System (NRAS) materials. During her eight years in Europe, Hollen observed that a soldier's ability to perform and endure hardship in the field had nothing to do with that soldier's gender. After her service with the 3rd Infantry Division, Hollen obtained a graduate degree in Telecommunications at the University of Colorado to prepare for an assignment with the White House Communications Agency. Hollen received a "below-the-zone" promotion to the rank of Major in 1991. Hollen resigned her commission in 1992. Hollen now works as a decision analyst for an environmental consulting company.

Major General Jeanne Holm, USAF (Ret.)

General Holm spent 33 years in the armed forces, from 1942 until her retirement in 1975, rising from private to two-star general. General Holm's military service began during World War II. General Holm is best known for her service as the Director of Women in the Air Force (1965 to 1972) where she advocated expanded opportunities and utilization of military women and the elimination of gender based policies and attitudes.

In 1971 she was the first Air Force woman to be promoted to brigadier general and two years later became the first woman in the armed forces to be promoted to major general. General Holm's last assignment was as Director of the Air Force Personnel Council. Her military awards include two Meritorious Service Medals and Legion of Merit. After retiring from the military, General Holm served as the Special Assistant for Women to President Gerald Ford; during the Carter administration she was a member of the Defense Advisory Committee on Women in the Services (DACOWITS) and a consultant to the Under Secretary of the Air Force.

In 1983, General Holm was appointed to the newly created Veterans Administration Advisory Committee on Women Veterans and served as its Chairman from 1986 to 1988. General Holm is the author of *Women in the Military: An Unfinished Revolution*, first published in 1982. A revised up-dated edition was published in 1992.

Major Pat Walker Locke, USA (Ret.)

Major Locke graduated in the first class of women at the United States Military Academy at West Point in 1980. From her academy experience she emerged as a determined leader. Locke succeeded in the Army as an Air Defense Artillery Officer. She assumed positions of leadership and responsibility in a combat arms branch (Air Defense Artillery): platoon leader; battery executive officer; Chief of Air Defense Artillery Brigade Tactical Evaluations; Battery commander; Combat Arms Division Professional Development Officer at PERSCOM; Executive Officer to Chief of Air Defense Artillery; Battalion Operations officer and Battalion Executive Officer of a Patriot Air Defense Artillery Battalion. After a rewarding career, Locke retired from the Army just after she was selected for promotion for lieutenant colonel ahead of her contemporaries -- an honor granted to few officers. Locke attributes this military success to her West Point experience.

Danna Maller

Danna Maller graduated with the first class of women from the United States Military Academy at West Point in 1980. Upon graduation, she successfully completed the Air Defense Artillery Officer Basic Course and was the first female graduate of West Point to graduate from the Army Rotary Wing Flight School.

She served in the 7th Combat Aviation Battalion which supported the 7th Infantry Division at Ft. Ord, California from 1981-1985. She was the Headquarter's Company Executive Officer prior to taking command of the UH-1 platoon of the General Support Aviation Company as a First Lieutenant. Her responsibilities included the training and welfare of 11 UH-1 pilots, 11 UH-1 crew chiefs and the scheduling and maintenance of 11 UH-1 Helicopters.

Maller later served as the Battalion Training Officer where she was responsible for developing and operating the Battalion Skills Training Program. During this time, she attended the Army Master Fitness Trainer Course and graduated with Honors. As Battalion Aviation Operations Officer, she was responsible for coordinating the Battalion's Aviation support of the 7th Infantry Division. Maller resigned as a Captain in September, 1985.

Maller credits the training she received at West Point and in the Army as a great part of her success in business. She worked with one of her West Point classmates for four years which led to her current position as the Executive Vice President of Llama Asset Management Company.

Major Lillian A. Pfluke, USA (Ret.)

Major Pfluke was in the first class of women to graduate from West Point in 1980. She graduated number one in her class in physical education, and in the top third of her class overall while studying weapons systems engineering. She earned a varsity letter on the men's ski team for ski jumping, was a captain of the women's lacrosse team for two years, and played intercollegiate softball, basketball, and swimming. She

was commissioned into the Ordinance Corps with specialties in mechanical maintenance and research, development, and acquisition. Her assignments in Germany, Fort Lewis, Washington, and Washington, D.C. include running various maintenance facilities, commanding the heavy maintenance company in the Ninth Infantry Division, and acting as the Patriot System Coordinator in the Pentagon. She is a former National Military Triathalon Champion, two-time National Military Cycling champion, and two-time European Military Ski Champion. She is a military parachutist and has made almost 200 sport parachute jumps. Her military schooling includes the Jungle Operations Training Course, the Ordinance Officer Basic and Advanced Courses, the Combined Arms Service Staff School, the U.S. Army Command and General Staff College, the U.S. Marine Corps Command and Staff College, and the Defense Systems Management College. She has a Masters Degree in Mechanical Engineering from the George Washington University and is a licensed professional engineer. She is the author of *Breastfeeding and the Active Woman.*

Lieutenant Julie M. Roberts, SC, USNR

Lieutenant Roberts graduated from the United States Naval Academy in 1984 and served on active duty for five years. Roberts served at Naval Air Station Sigonella, Sicily as the Disbursing Officer and Assistant Officer-in-Charge of the Personnel Support Detachment. Supporting 3000 permanent service members during heightened readiness conditions in Europe, Roberts supervised 18 military and civilian employees and managed up to $7 million. Upon completion of the Navy School of Physical Distribution Management, she was a Transportation Officer at the Military Ocean Terminal Bay Area, a jointly staffed command. There, Roberts managed a container shipping operation, overseeing $20 million in civilian contracts and directly supervising 12.

After leaving the military, Roberts was a Regional Manufacturing and Distribution Manager in the beverage industry. Placed in a very demanding and all-male environment, she

succeeded largely on the lessons learned at the Naval Academy. Roberts earned an MBA from the Kellogg Graduate School of Management at Northwestern University. She has since worked with a leading management consulting firm.

Major Alison Ruttenberg, COANG

Major Alison Ruttenberg is currently a Judge Advocate in the Colorado Air National Guard, assigned to the 140th Fighter Wing at Buckley Air National Guard Base, Aurora, Colorado.

Attending UCLA with a four-year Air Force ROTC scholarship, she was one of the first five female Air Force ROTC cadets selected to be Titan II Intercontinental Ballistic Missile Launch officers upon commissioning. In 1980, Ruttenberg was selected as one of the first female Cadet Corps Commanders. She graduated as an Air Force ROTC Distinguished Graduate in 1981, was commissioned as Second Lieutenant and attended Titan II Intercontinental Ballistic Missile Launch officer training. In August 1981, she graduated as a Distinguished Graduate of the Missile Launch Officer Initial Qualification Course, and was assigned to the 390th Strategic Missile Wing at Davis-Monthon Air Force Base, Tucson, Arizona as a Titan II Deputy Combat Crew Commander. Transferring to the 308th Strategic Missile Wing at Little Rock Air Force Base, Arkansas, she was selected to be a Titan II Missile Combat Crew Commander while still a First Lieutenant.[1] Upon promotion to Captain in 1985, she became

[1] After 1980, all Titan II missile crews were mixed-gender, and Ruttenberg commanded both men and women. Missile Combat Crews have duty shifts (called "alerts") in the Titan II underground control capsule, at close-quarters, for periods ranging from 24 hours to 72 hours during exercises. The average Missile Combat Crew had eight or nine alerts per month. The crews shared one bathroom and one bunkroom. Therefore, Missile Combat Crew members spent an inordinate amount of time in close-quarters with each other.

There was no difference in readiness between mixed and all-male crews, and women were highly successful commanders, well able to withstand the stress and challenge of command in a combat ready atmos-

(Footnote continued)

one of the commanders of the Little Rock Air Force Base Alternate Command Post. As the Alternate Command Post Commander, Ruttenberg was a member of the 308th Strategic Missile Wing Alternate Battle Staff during exercises of the strategic nuclear forces. She resigned from active duty in September 1986 and became an officer in the Air Force Reserve Component.

While she was a Missile Combat Crew Commander, Ruttenberg attended the University of Arkansas Law School part-time, graduating with high honors in 1987. During Desert Storm, she returned to active duty and was the Air Force Liaison Officer to the Ambassador to the Dominican Republic. Ruttenberg returned to the Colorado National Guard in April, 1992, was promoted to Major in May, 1994, and is currently in private practice in Denver, Colorado.

Mary Rosinski Whitley

Mary Whitley graduated from the United States Military Academy at West Point in 1980 in the first graduating class that contained women. She was commissioned an Army Lieutenant and served eleven years of active military service. As a Lieutenant, Whitley was a Platoon Leader for 67 truck drivers in the 24th Infantry Division, Ft. Stewart, Georgia. As a Captain, she was a Company Commander for 180 truck drivers and mechanics in Mannheim, Germany and routinely worked 60 hour weeks to maintain the high state of personnel and equipment readiness required in NATO. The leadership and management skills she learned while a cadet were put into practice in these positions. While in Germany, she attended night school and earned a Master of Science in Systems Management from the University of Southern California. Reassigned from Germany to the Pentagon, she was the youngest officer on the Army staff for three years and one of very few

phere. For example, when the Strategic Air Command Inspector General inspected the 308th Strategic Missile Wing, Ruttenberg easily led her crew to an all "highly-qualified" rating in simulated combat drills ordered by the Inspector General.

women officers. After serving for one year as an intern, she was assigned to Ft. Belvoir as a computer systems analyst.

Whitley resigned her commission and joined the General Services Administration in 1991 as a computer systems analyst and program manager and subsequently became Director of one of the operating divisions, supervising thirty program managers.

Brigadier General Roger C. Bultman, USA (Ret.)

Brigadier General Bultman was commissioned in 1966 as a second lieutenant. In Vietnam, he served in combat as an infantry platoon leader with the 196th Light Separate Infantry Brigade, a company commander of an infantry company in the First Cavalry Division (Air Mobile), and an assistant battalion operations officer with the 199th Light Infantry Brigade and installation intelligence officer for the Military Assistance Command. Leaving active duty in 1970, he joined the Army Reserve and the 84th Division, serving in several capacities. In 1977, he was assigned to the Active Guard and Reserve Program at the Reserve Components Personnel Administration Center in St. Louis, serving in a variety of capacities including Director of the Enlisted Management Directorate.

In the 1980s, General Bultman had several assignments at the Pentagon, including service in the Office of the Deputy Chief of Staff for Personnel, Headquarters, Department of the Army, serving as Chief, Congressional Liaison and Programs in the Office of the Chief, Army Reserve, Executive Officer and Chief of Staff for the Chief, Army Reserve, and Commander, Army Reserve Support Center, Military District of Washington. In 1992, General Bultman transferred to the Retired Reserve.

General Bultman's awards and decorations include the Distinguished Service Medals, Legion of Merit (two awards), two Bronze Star Medals, two Meritorious Service Medals, Air Medal, two Army Commendation Medals, Vietnam Campaign Medal, and Vietnam Service Medal with eight campaign stars.

Dr. Margarethe Cammermeyer

Margarethe Cammermeyer enlisted in the Army student nurse program mid-way through college at the University of Maryland. She later volunteered for service in Vietnam. In 1968, after fourteen months as head nurse of a medical and later neurosurgical intensive care unit at an evacuation hospital in Vietnam, for which she was awarded the Bronze Star Medal, she returned to the United States. After the birth of her first child, she was forced to leave the military in 1968 because of a regulation that forbade women with dependents to remain in the military.

When that regulation was changed in 1972, she returned to the military in the Army Reserves, ultimately achieving the rank of Colonel in 1987. She completed the Nurse Corps Basic and Advance Course, the Command and General Staff Course and Combat Casualty Course. She also earned a Master of Arts in Nursing and PhD in Nursing Science from the University of Washington in 1991.

Since 1975 Dr. Cammermeyer has served as a neuroscience clinical nurse specialist in Veterans Affairs Medical Centers in Seattle, WA, San Francisco, CA, and Tacoma, WA. Her numerous awards and honors include "Woman of the Year" by the Woman's Army Corps Veterans, the Meritorious Service Medal, Nurse of the Year by the Veterans Affairs Department (1985), Honorary Human Rights Award by the American Nurses Association, and Humanitarian Award by the Privacy Fund. She was listed in Who's Who of Women (1993–1994) and was the 1995 Distinguished Alumna from the University of Washington School of Nursing. Colonel Cammermeyer is currently serving as Chief Nurse of the 164th MASH in the National Guard.

Captain (Sel.) Eileen L. O'Hickey, CHC, USN

Chaplain O'Hickey received her B.A. (*magna cum laude*, 1974) from the University of New Hampshire and was commissioned as lieutenant junior grade in the U.S. Navy in September 1978.

O'Hickey was featured in *Outstanding Young Women of America, 1982* and was selected "Military Woman of the Year" at Naval Air Station Norfolk (1983) and at Marine Corps Base Camp Pendleton (1987). She was awarded "Military Member of the Year" at Naval Submarine Base New London (1990). O'Hickey is currently the senior woman on active duty in the Navy Chaplain Corps. In 1996, she will be the first woman in the Navy Chaplain Corps promoted to captain.

Chaplain O'Hickey is currently serving as the Head, Ministry Policy Branch, Office of the Chief of Chaplains in Washington, D.C. Her awards include the Meritorious Service Medal, Navy Commendation Medal (three awards), National Defense Medal and the Overseas Service Ribbon.

Lieutenant Colonel Karen Johnson, USAF (Ret.)

Lieutenant Colonel Johnson received a direct commission as a military officer in the United States Air Force Nurse Corps in 1972. Her military education includes Officer Basic Military Training, Nursing Service Management Course, Squadron Officers School, and Air Command and Staff College.

During the Vietnam Conflict, Johnson served as one of only 14 military females on a base of over 3,000 military men in northern Thailand. Besides her nursing duties, she was the medical facility Equal Opportunity and Treatment Officer and served on the base Human Relations Council. From Thailand, Johnson went on to serve in military hospitals in Spain, Texas and Ohio. In 1980, Johnson was selected "Nurse of the Year" at the Air Force's largest medical center. Through Air Force sponsored education in 1984, Johnson earned a masters of science from Yale University.

Lieutenant Colonel Johnson retired in 1992 with awards and decorations that include the Air Force Commendation Medal, the Humanitarian Service Medal and two Meritorious Service Medals.

Major Jane McKeon, USA

Major McKeon graduated in 1980 from the United States Military Academy at West Point. McKeon has a master's degree in counseling and taught in the Department of Leadership and Behavioral Science at West Point for three years. She is currently stationed at Ft. Leavenworth, Texas.

Major Mary M. Finch, USA

Major Finch graduated from the United States Military Academy at West Point in 1983. Finch served as an Army aviator in Europe. Finch is Airborne and Air Assault qualified and has flown UH-1 and OH-58 helicopters. In 1991, Finch served on the Presidential Commission on the Assignment of Women in the Armed Forces. She is presently in the Army Acquisition Corps and is stationed at Ft. Belvoir, Virginia.

WANDAS

Women Active in our Nation's Defense, Their Advocates and Supporters ("WANDAS") is composed of two national groups. Founded in Denver in 1993, the WANDAS organizations are coalitions of civilian men and women who presently serve on active duty in the armed services, the reserve and the national guard. The Founders of WANDAS were concerned that women who presently serve in the military had no organized set of advocates outside the Department of Defense to assist and support them on important professional issues.

WANDAS Fund provides direct support services to its military members. It also provides volunteer lawyers to represent military women in court and on appeals from adverse personnel decisions. The litigation work focuses on those cases where the issues have broader impact than assistance to one individual.

(15) (18)

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IN THE

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OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, ET AL.,
Respondents.

COMMONWEALTH OF VIRGINIA, ET AL.,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA,
Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF TWENTY-SIX PRIVATE WOMEN'S COLLEGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER*

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Brenau Women's College (GA)
Chatham College (PA)
Chestnut Hill College (PA)
College of St. Benedict (MN)
College of St. Catherine (MN)
College of St. Elizabeth (NJ)
College of St. Mary (NE)
Columbia College (SC)
Hartford College for Women (CT)
Lesley College (MA)
Marymount College-Tarrytown (NY)
Midway College (KY)
Mount St. Mary's College (CA)
Mount Vernon College (D.C.)
Notre Dame College of Ohio
Pine Manor College (PA)
Russell Sage College (NY)
St. Mary's College (IN)
St. Mary-of-the-Woods College (IN)
Seton Hill College (PA)
Spelman College (GA)
Trinity College (D.C.)
Trinity College of Vermont
Ursuline College (OH)
Wilson College (PA)

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On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICI CURIAE*

The twenty-six undersigned private women's colleges submit this brief as *amici curiae*, urging reversal of the decision of the court of appeals.[1]

These are all private women's colleges whose mission is to increase educational opportunities for women. The colleges have found, through their various activities and experiences, that women's colleges are particularly effective in preparing women for the many roles they will assume in life. Women's colleges offer an excellent academic education, challenge women to realize their full potential, and connect women into networks that will serve them during the course of their professional and personal lives. Single-gender education for women greatly increases the chances that a woman will succeed academically, pursue a career in a field traditionally associated with men, or assume a leadership role in society.

[1] The colleges signatory to this brief are: Bennett College (NC) Brenau Women's College (GA), Notre Dame College of Ohio, Chatham College (PA), Chestnut Hill College (PA), Pine Manor College (PA), College of St. Benedict (MN), Russell Sage College (NY), College of St. Catherine (MN), St. Mary's College (IN), College of St. Elizabeth (NJ), Seton Hill College (PA), College of St. Mary (NE), Spelman College (GA), Columbia College (SC), Trinity College (D.C.), Lesley College (MA), Trinity College of Vermont, Marymount College-Tarrytown (NY), Ursuline College (OH), Midway College (KY), Wilson College (PA), Mount St. Mary's College (CA), Mount Vernon College (D.C.), Hartford College for Women (CT), St. Mary-of-the-Woods College (IN). Pursuant to Rule 37.3 of the Rules of this Court, these colleges have filed with the Clerk the written consents of the parties in this case to the submission of this *amici curiae* brief.

According to literature compiled by an organization of women's colleges, 30% of the 50 women recognized as rising stars in corporate America by *Business Week* received their baccalaureate degree from a women's college. One-third of the women board members of the 1992 Fortune 1000 companies are women's college graduates. Of 54 women in Congress, 13 attended women's colleges. One of every seven women cabinet members in state government attended a women's college. Nearly three-quarters of all women's college graduates are in the work force, and almost half of those graduates hold traditionally male-dominated jobs, at the higher end of the pay scale, such as lawyer, physician or manager. Women's College Coalition, *A Profile of Recent College Graduates* (1993). In short, as summarized by Elizabeth Tidball, a pioneer in the field of evaluating the productivity of academic institutions with respect to women in science:

> "Graduates of women's colleges are more than twice as likely as graduates of coeducational colleges to receive doctorate degrees, and to enter medical school and receive doctorates in the natural sciences." M. Elizabeth Tidball, *Baccalaureate Origins of Entrance into American Medical Schools*, 57 Journal of Higher Education (1986).

The literature is persuasive that the intellectual development of women is enhanced when they have, at least, a few years to learn and study with each other in a single-gender environment. See, *e.g.*, Women's College Coalition, *A Profile of Recent College Graduates* (1993).

As a result of these colleges' focus on the benefits and promotion of single-gender higher education for women, they are particularly interested in this litigation involving the

Constitutionality of the all-male admissions policy of Virginia Military Institute ("VMI"). They submit the *amici* brief in this case not because they believe that a ruling here will have an impact on their own admissions policies, but in order to make clear that the result in this case would not have any such effect. VMI is a public institution; it has an admissions policy that limits enrollment to men; and it has a mission that perpetuates the traditional stereotype of men as soldiers, who learn from adversity, while women need "cooperative confidence building program[s]." *United States v. Virginia*, 44 F.3d 1229, 1234 (4th Cir.), *cert. granted*, 164 U.S.L.W. 3267 (Oct. 5, 1995). For all these reasons, the decision below, which provides that VMI may maintain its public status while continuing to exclude women applicants, should be reversed. A ruling that VMI cannot remain a public, all-male institution, however, does not in any way suggest that private women's colleges cannot continue to provide single-gender educational opportunities for women who choose to attend these institutions.

SUMMARY OF ARGUMENT

This case comes to this Court with a long history. In *United States v. Virginia*, 976 F.2d 890 (4th Cir. 1992) *("VMI I")*, *cert. denied*, 113 S. Ct. 2431 (1993), the court of appeals held that VMI's exclusion of women violated the Equal Protection Clause of the Fourteenth Amendment, and remanded the case to permit VMI to remedy this Constitutional violation. VMI could have chosen to open its doors to women - as have the U.S. military academies -or, as suggested by *VMI I*, to become a private college. Instead, VMI opted to create a separate and different leadership program for women, a program with a concededly different educational philosophy and disparate academic plan -- a program that lacked the tradition and stature of VMI. The

court of appeals approved this separate program in *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995) *("VMI II")*.

In this Court, the Commonwealth of Virginia now challenges the initial determination that VMI's male-only admissions policy violates the Equal Protection Clause. The United States, on the other hand, seeks reversal of the decision to accept the VMI remedial plan. As we show below, the *VMI I* court correctly concluded that VMI's all-male admissions policy was unconstitutional, while in the *VMI II* Court erroneously ruled that the VMI remedy passed constitutional muster. Accordingly, *VMI II* should be reversed. It should be reversed because, under the Equal Protection Clause, a public institution cannot predicate its admissions policies on impermissible sexual stereotypes. For this reason, reversing *VMI II* would not impair the continued viability of private women's colleges. Such private institutions, unlike VMI, are not instrumentalities of the State, and operate to dissipate, rather than perpetuate, traditional gender classifications.

ARGUMENT

I. *VMI II* SHOULD BE REVERSED BECAUSE THE ALL-MALE PUBLIC MILITARY COLLEGE AND ITS PARALLEL "VWIL" PROGRAM, FAIL THE TEST OF *MISSISSIPPI UNIVERSITY FOR WOMEN v. HOGAN*.

A. A Single-Gender Public College May Not Rely on Stereotyped Generalizations about Men and Women in Justifying its Admissions Policy.

In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), this Court addressed the Constitutionality under

the Equal Protection Clause of the Fourteenth Amendment of "a state statute that exclude[d] males from enrolling in a state-supported professional nursing school." *Id.* at 719. As the Court there made clear, that case presented a "narrow issue," limited to the Constitutionality of a single-gender admissions policy that (l) was maintained by a state-supported university, and (2) excluded men from a nursing program. *Id.* Indeed, the Court explicitly left open in *Hogan* the question of whether excluding males from other programs at the University would violate the Fourteenth Amendment. *Id.* at 723 n.7.

Nevertheless, while the decision in *Hogan* was tailored to its facts, this Court there articulated the Constitutional standard for reviewing the validity of single-gender admissions policies of public colleges and universities. That standard requires that a party seeking to uphold a statute that classifies individuals on the basis of their gender must show an "'exceedingly persuasive justification'" for the classification. *Id.* at 724 (citation omitted). At the least, this showing is met by demonstrating that "the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* (citation omitted).

The *Hogan* Court went on to emphasize that in order for those objectives to survive Constitutional scrutiny, they must avoid the perpetuation of traditional gender stereotypes:

> "Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." *Id.* at 724-25 (citation and footnote omitted).

VMI cannot satisfy this Constitutional undertaking. The Commonwealth of Virginia argues that the male-only admissions policy at VMI is justified by the Commonwealth's objective belief in the pedagogical value of a single-gender education and in its legitimate interest in providing a diversity of opportunities in its higher education offerings. Cross-Pet. at 4-5. It further asserts that the policy of limiting VMI admission to only one gender is narrowly tailored to achieving the benefits that a single-gender education provides. *Id.* at 5. Alternatively, it argues that VMI's gender restrictive admissions policy is "directly related to achieving the results of an adversative method in a military environment," because "'the unique characteristics of VMI's program would be destroyed by coeducation.'"[2] *Id.* at 6.

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[2] As the dissent recognized in the decision below, there is reason to question whether any of these purported justifications provide the real basis for the male-only admissions policy. Inquiry into the history and actual purpose of VMI's discriminatory admissions policy and proposed remedial action plan would support the conclusion that the primary and overriding purpose is "not to create a new type of educational opportunity for women, nor to broaden the Commonwealth's educational base for producing a special kind of citizen-soldier leadership, nor to further diversify the Commonwealth's higher education system . . . but is simply by this means to allow VMI to continue to exclude women in order to preserve its historical character and mission as that is perceived and has been primarily defined in this litigation by VMI and directly affiliated parties." *VMI II*, 44 F.3d at 1247 (Phillips, J., dissenting) (footnote omitted). Even if the asserted reasons are credited, however, the policy still fails to pass constitutional muster.

None of these formulations of the justification for providing military training for men and not for women can serve an "important governmental objective." As this Court recognized in *Hogan*, no gender-based classification can be justified on the ground that it provides a benefit or choice not available to the other gender. *Id.* at 731 n.17. In the words of this Court:

> "The issue is not whether the benefitted class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal." *Id.*

Thus, VMI's male-only admissions policy cannot be supported on the ground that it provides a "unique" educational opportunity for men or that it offers diversity in educational opportunities, because a State cannot generally have as an important governmental objective the provision of a program to members of only one sex.

This is not to say, as this Court held, that gender-based classifications favoring one sex can never be justified. "In limited circumstances, [such] a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." *Id.* at 728. Just as the nursing program at Mississippi University for Women could not meet this standard, so the military program at VMI cannot be so justified. Indeed, VMI's policy of excluding women from admission to its military program, and its bases for doing so, expressly perpetuate the stereotyped view that only men are capable of rigorous military training. In short, it could hardly be said that men should be favored in military training as a result of past discrimination in this field.

Finally, VMI makes the argument that homogeneity of gender is, in itself, a legitimate and important governmental objective because it is necessary to "achieving the results of an adversative method in a military environment." Cross-Pet. at 6. In so contending, the Commonwealth has confused means and ends. The Commonwealth cannot contend that using the adversative method is, in itself, an important governmental objective. At best, it can argue that using the adversative method is substantially related to the important government objective of training "citizen-soldiers."[3] But even assuming the Commonwealth has shown that the adversative method is narrowly tailored to the legitimate goal of training citizen soldiers, and that homogeneity of gender is necessary to implement that methodology, the Commonwealth still must justify its decision to provide such training only to those men who desire it and not also to those individual women who share this desire. Moreover, it must do so without relying on stereotypical notions of the proper roles and abilities of men and women or on generalizations about the attitudes or preferences of men or of women as a group. Since the Commonwealth has not made and cannot make such a showing, its decision to deny women the unique benefits of a VMI education available to men cannot survive constitutional scrutiny.

Accordingly, under any of its purported justifications, VMI fails the *Hogan* standard for maintaining single-gender, state-supported colleges and universities.

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[3] This assumption is, itself, subject to considerable debate. VMI's own mission statement defines citizen soldiers as "educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary." *VMI I*, 976 F.2d at 893. By all accounts, the United States military academies have continued to enjoy considerable success in training men and women as "citizen-soldiers" even though they have abandoned the use of the adversative method as a training tool.

B. The Remedy Proposed by VMI Violates the Equal Protection Clause Because it Justifies Differential Treatment of Men and Women with Reference to Gender-Based Stereotypes.

In *VMI I*, the court of appeals found that the failure of the Commonwealth to offer women benefits comparable to those offered to men at VMI constituted a violation of the Equal Protection Clause. The *VMI I* court, however, did not order that VMI become a coeducational college. Rather, it remanded the case to the district court, directing the Commonwealth to formulate, adopt, and implement a remedial plan. The remedial plan for the equal protection violation offered by the Commonwealth, and later affirmed by the court of appeals in *VMI II*, was to create a separate single-gender, state-supported leadership training institute (the "Virginia Women's Institute for Leadership" or "VWIL") at Mary Baldwin College for women seeking to be trained as "citizen-soldiers." This program, all parties agree, shuns the adversative method of education and relies, instead, on educational and social methodologies wholly different from those used at VMI.

This remedial plan, however, fails to rectify the Constitutional infirmity of the Commonwealth's single-gender admissions policy at VMI. This Court has never ruled on the Constitutionality of separate but equal educational facilities for men and women, having soundly rejected the propriety of such sepa
rate education in the context of race.[4] However, when separate educational facilities for the races were tolerated, they were permitted if and only if they were substantially

[4] See *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal.").

equal on all relevant tangible and intangible criteria by which educational institutions are evaluated. See, *e.g.*, *Sweatt v. Painter*, 339 U.S. 629, 633-34 (1950) (finding separate state-supported law schools for blacks and whites intolerable where tangible resources such as library size and intangible resources such as position and influence of alumni and prestige were not substantially equivalent).

In this case, it is clear that requiring women who seek training as "citizen-soldiers" to attend the VWIL, while permitting men who seek such training to attend VMI, does not treat men and women substantially equally. The VWIL falls far short of VMI in its breadth of curricular offerings, endowment, reputation, facilities, strength of alumni networks, and prestige. As Judge Phillips concluded in his dissenting opinion in *VMI II*:

> "[T]he contrast between [VMI and the VWIL] on all the relevant tangible and intangible criteria is so palpable as not to require detailed recitation. If every good thing projected for the VWIL program is realized in reasonably foreseeable time, it will necessarily be then but a pale shadow of VMI in terms of the great bulk, if not all of those criteria." *VMI II*, 44 F.3d at 1250 (Phillips, J., dissenting).

Moreover, whether or not this Court were to hold the "separate but equal" jurisprudence to be applicable to the maintenance of single-gender education, it is conceded here that under the proposed remedial plan, men and women will be treated differently. Specifically, while VMI will continue to provide men the opportunity to receive a state-supported military style education using the adversative method, the very tool that the Commonwealth has represented to be essential to achieving VMI's leadership training goals,

women admitted to the VWIL will not enjoy that opportunity to develop the same leadership skills and to receive the same educational benefits.

As the *Hogan* Court made clear, in order for this disparity in treatment between men and women to survive equal protection scrutiny, it must be supported with an "exceedingly persuasive justification." In this case, however, the only justification that the Commonwealth has offered to explain this disparity eviscerates this Court's equal protection authority by incorporating and relying on the very gender stereotyping that this Court's jurisprudence forbids. Thus, the Commonwealth asserted, and the court of appeals affirmed, that the decision not to offer a VMI style education at the VWIL was motivated by the belief that "aspects of VMI's military model, especially the adversative method, would not be effective for women as a group, even though . . . some women would be suited to and interested in experiencing a 'women's VMI.'" *VMI II*, 44 F.3d at 1233-34. This group perception of women is precisely what the Constitution rejects. As Justice Kennedy recently explained in his concurring opinion in *J.E.B. v. Alabama*, 114 S. Ct. 1419, 1434 (1994):

> "The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups . . . . 'At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class.'"

Consequently, in relying on assumptions about women as a group, while acknowledging that individual women may behave differently than the stereotyped model predicts, the

court of appeals below erroneously approved the VMI remedial plan, and its decision should be reversed.

II. THE REVERSAL OF *VMI II* WOULD NOT UNDERMINE OR THREATEN THE MAINTENANCE OF PRIVATE WOMEN'S COLLEGES.

In *VMI I*, the court of appeals, recognizing that VMI's male-only admissions policy violated the Equal Protection Clause, directed the Commonwealth to develop and implement a solution to remedy the equal protection violation. Three options were presented. The court held that Virginia "might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution." *VMI I*, 976 F.2d at 900. As demonstrated above, the development of parallel institutions or programs failed to pass constitutional muster. As we show below, the third option -- going private -- could have provided a remedy.

A. The Equal Protection Clause Does Not Apply to Private Single-Gender Colleges and Universities.

That the Fourteenth Amendment "erects no shield against merely private conduct" and inhibits "only such action as may fairly be said to be that of the States" are principles that have been "embedded in our constitutional law" since 1883. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (referring to the *Civil Rights Cases*, 109 U.S. 3 (1883)). Equal protection jurisprudence since that time has established that the application of the Equal Protection Clause to actions taken by educational institutions depends, first, on whether the

institutional actor is "private," and second, on whether the action taken by the institution may "be fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

The factors that determine whether a college or university is public or private are well-settled by this Court. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). In *Dartmouth College*, this Court found that neither the national interest in education nor New Hampshire's incorporation of the college transformed Dartmouth into a public entity. Rather, the college's charter established its status as a private educational institution by demonstrating that the college was founded by a private citizen, funded through a private endowment, and governed by a privately appointed board of trustees. The features that led the Court to conclude that Dartmouth was a private institution -- its origin, its sources of financial support, and its governing structure -- remain the hallmarks of private colleges and universities today.[5]

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[5] See *Rendell-Baker v. Kohn*, 457 U.S. 830, 831-32 (1982) (school was founded as a private institution, incorporated as a nonprofit entity, located on private property, and governed by a private board of directors who were not selected by public officials); *Board of Trustees for Vincennes Univ. v. Indiana*, 55 U.S. (14 How.) 268, 276-77 (1852) (college that was governed by a privately appointed board of trustees was not a public institution, subject to the state's control, even though it was located on land donated by Congress to be held in trust by the State for the creation of an educational institution; *Pime v. Loyola Univ. of Chicago*, 803 F.2d 351, 352, 357 (7th Cir. 1986) (university was founded by religious order, incorporated as a nonprofit entity, and governed by a president and private board of trustees, a specified number of whom were required to be members of the founding order) (Posner, C.J., concurring). *Cf., Braden v. University of Pittsburgh*, 552 F.2d 948, 959-61 (3d Cir. 1977) (former private university was transformed into "state-related institution" as a result of legislative "'comprehensive restructuring'" of the university that granted elected officials the power to (continued...)

The recognition of a college or university as private, however, may not completely shield it from application of the Equal Protection Clause. Where the State "has exercised coercive power or has provided such significant encouragement, either overt or covert" over the suspect action of the institution, that action may be deemed "state action," subject to the requirements of the Fourteenth Amendment. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

This Court has enunciated various tests or factors for determining whether a particular action taken by a private institution constitutes state action. *Edmondson Oil*, 457 U.S. at 939. For example, the "public function" test asks whether the State has endowed "private individuals or groups . . . with powers or functions [that are] governmental in nature," such that the private groups act as "agencies or instrumentalities of the State" itself. *Evans v. Newton*, 382 U.S. 296, 299 (1966) (maintenance of white-only city park under private trusteeship involved State action). The "close nexus" test looks at the link between the particular challenged action and the State to see if the challenged action is "compelled" or "influenced" by the State. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-51 (1974) (state action not established when State regulation of a public utility was unrelated to employee termination); *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (state action not established when State and local regulation of private high school was not related to teacher's dismissal). The "symbiotic relationship" test directs attention to the "interdependence" between the private entity and the State to examine whether the State has "place[d] its power,

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[5] (...continued)
appoint trustees and name certain public officials as *ex officio* trustees, gave the state widespread regulatory control over all fiscal matters and management, and dedicated public monies to support the university).

property and prestige" behind the challenged action. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (racially discriminatory service of restaurant located in publicly owned and operated parking garage constituted State action). Whether these "tests are actually different in operation or simply different ways of characterizing the . . . inquiry" in different factual circumstances, they all seek to distinguish routine involvement by the State in the affairs of a private entity from involvement that constitutes the "something more" necessary to convert the private entities' action into that of the State. *Edmondson Oil*, 457 U.S. at 939.

Regardless of which state action test is applied in a given case, the Court has encouraged "[c]areful adherence" to the state action requirement. *Edmondson Oil*, 457 U.S. at 936. That advice is particularly critical in the context of equal protection analyses involving private colleges and universities, where an ill-considered finding of state action "might incidentally contribute to the erosion of the autonomy and diversity of private colleges and universities." *Berrios v. Inter American Univ.*, 535 F.2d 1330, 1333 (1st Cir. 1976). Accordingly, courts have assiduously and wisely avoided a broad interpretation of state action in cases involving private institutions of higher education.

For example, courts have consistently followed *Dartmouth College's* holding that the registration, certification, or incorporation of the private entity by the State does not transform the private entity into a state actor.[6] They have also uniformly held that the "mere

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[6] See e.g., *McKeesport Hosp. v. Accreditation Council*, 24 F.3d 519, 527 (3d Cir. 1994); *Yeager v. City of McGregor*, 980 F.2d 337, 342 n.9 (5th Cir.), (continued...)

offering of an education, regulated by the State," does not imbue private action with sufficient public interest to render it governmental in nature. *Krohn v. Harvard Law School*, 552 F.2d 21, 24 (1st Cir. 1977). In *Rendell-Baker*, 457 U.S. at 842, for example, legislation that guaranteed public funding to educate maladjusted high school students did not make such specialized education "the exclusive province of the State."[7]

Courts have, in addition, found that considerable regulation by the State does not compel application of the Equal Protection Clause to private educational institutions. The private school at issue in *Rendell-Baker*, for example, was subject to substantial regulation by a number of public entities, including local school committees, the State Drug Rehabilitation Division and other state agencies. *Rendell-Baker*, 457 U.S. at 833. Similarly, the university in *Inter American University*, 535 F.2d at 1332, was subject to regulations of the state accrediting council as well as other regulations applicable to institutions of higher education. The mere regulation of these entities by public bodies, however, was "not sufficient" to render the institutions state

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[6] (...continued)
cert. denied, 114 S. Ct. 79 (1993); *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818, 824 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Blouin v. Loyola Univ.*, 506 F.2d 20, 21-22 (5th Cir. 1975); *Blackburn v. Fisk Univ.*, 443 F.2d 121, 123 (6th Cir. 1971); *Powe v. Miles*, 407 F.2d 73, 80 (2d Cir. 1968).

[7] *Accord Inter American Univ.*, 535 F.2d at 1333 ("[h]igher education is not generally regarded as exclusively a function 'traditionally associated with sovereignty'") (citations omitted); *Fisk Univ.*, 443 F.2d at 124 (same); *Ben-Yonatan v. Concordia College Corp.*, 863 F. Supp. 983, 987 (D. Minn. 1994) (same).

actors.[8] *Rendell-Baker*, 457 U.S. at 842; *Inter American Univ.*, 535 F.2d at 1332.

Finally, courts have routinely held that institutions that enjoy tax-exempt status[9] or receive public money in the form of loan guarantees, scholarships, or grants,[10] are not, by virtue of their receipt of these public funds, transformed into state actors.[11] Indeed, even where the public funds received by the private entity are substantial, courts have declined to

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[8] *Accord Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972); *Cohen*, 524 F.2d at 826; *Powe*, 407 F.2d at 81; *Stone v. Dartmouth College*, 682 F. Supp. 106, 108 (D.N.H. 1988); *Blum*, 457 U.S. at 1011.

[9] See, *e.g.*, *New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 512 F.2d 856, 859 (2d Cir. 1975) (tax exemption "'creates only a minimal and remote involvement'" by the government in the exempt entity's activities) (citations omitted); *Browns v. Mitchell*, 409 F.2d 593, 595-96 (10th Cir. 1969) (tax exempt status does not render institution a state actor); *Fischer v. Driscoll*, 546 F. Supp. 861, 865 (E.D. Pa. 1982)(same).

[10] See, *e.g.*, *Inter American Univ.*, 535 F.2d at 1332 (university that participated in state student aid program was not found to be a state actor); *Loyola Univ.*, 506 F. 2d at 21; (fact that private university received "substantial federal and state monies in the form of grants, subsidies, student scholarships, and loans" did not support a finding of state action); *Greenya v. George Washington Univ.*, 512 F.2d 556, 561 (D.C. Cir.) ("direct grants, loans, or loan guarantees" were not sufficient to establish state action by otherwise private university), *cert. denied*, 423 U.S. 995 (1975).

[11] See also *McKeesport Hosp.*, 24 F.3d at 527 (public funds); *Yeager*, 980 F.2d at 342 n.9 (same); *Krohn*, 552 F.2d at 24 (public funds and tax exempt status); *Lorentzen v. Boston College*, 440 F. Supp. 464, 465 (D. Mass. 1977) (public funds and tax exempt status), *aff'd*, 577 F.2d 720 (1st Cir. 1978), *cert. denied*, 440 U.S. 924 (1979); *Cohen*, 524 F.2d at 825 (public funds); *Fisk Univ.*, 443 F.2d at 123 (public funds and tax-exempt status); *Gonyo v. Drake Univ.*, 879 F. Supp. 1000, 1006 (S.D. Iowa 1995) (public funds); *Ben-Yonatan*, 863 F. Supp. at 987 (state and federal financial support); *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535, 546-48 (S.D.N.Y. 1968) (public funds).

find state action. The private school's dismissal of teachers without due process in *Rendell-Baker*, for example, did not constitute state action in spite of the fact that the school received "virtually all of [its] income" from various state agencies. *Rendell-Baker*, 457 U.S. at 840. Similarly, the university's conduct in *Imperiale v. Hahnemann University*, 776 F.Supp. 189, 198 & n.4 (E.D. Pa. 1991), *aff'd*, 966 F.2d 125 (3d Cir. 1992), did not constitute state action even though the university received "'substantial infusions of state funds'" which were "clearly of great importance to it." (Citation omitted.) Thus, it is clear that the mere receipt of government loans or funding "is not, without a good deal more, enough to make the recipient an agency or instrumentality of the Government." *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535, 548 (S.D.N.Y. 1968).[12]

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[12] *Norwood v. Harrison*, 413 U.S. 455 (1973), had a different result. In *Norwood*, this Court found that the state's financial aid in the form of the provision of textbooks to private elementary and secondary schools that discriminated on the basis of race constituted state action. A canvas of the state action cases since *Norwood*, however, indicates that the Court's broad reading of the state action doctrine in that case has been limited to circumstances in which the challenged action involves invidious racial discrimination. As one court noted, "'racial discrimination is so peculiarly offensive and was so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts.'" *George Washington Univ.*, 512 F.2d at 560 (finding that federal funding for a private university's programs and capital expenditures did not constitute state action where the challenged action was the termination of employment of an instructor without due process and in violation of his First Amendment rights) (citation and footnote omitted). While courts have found that even minimal aid to a private racially discriminatory institution triggers application of the Equal Protection Clause, see *id.*, 512 F.2d at 560 n.6 (collecting cases in which racial discrimination by a private entity constituted state action and contrasting these cases to state action determinations that went the other way in other contexts), they have, at the same time, developed and applied the state action tests discussed above in circumstances that do not involve racial

(continued...)

In sum, courts have consistently held, under one or another formulation of the state action test, that the actions of private colleges and universities are not considered those of the State simply because such institutions provide educational services, are regulated by the State, enjoy tax-exempt status, or receive state services or funding. Something more -- the assumption by the private entity of functions which are traditionally governmental in nature or State involvement that compels or supports the challenged private action -- is required. *Edmonson Oil*, 457 U.S. at 939. Consequently, the single-gender admissions policies of private colleges, which serve no governmental function and are not compelled by or related to the State, are not governed by the Equal Protection Clause. This means that if VMI could abandon its state-related public status, it could maintain its single-gender policy.

B. The Tax-Exempt Status of Private Women's Colleges Is Not Threatened by the Public Policy Requirement Enunciated in *Bob Jones University v. United States*.

Just as the Equal Protection Clause does not prohibit private colleges from maintaining single-gender admissions policies, federal tax regulations cannot force them to close their doors. *Bob Jones University v. United States*, 461 U.S. 574 (1983) does not suggest otherwise.

In *Bob Jones*, this Court affirmed the Internal Revenue Service's denial of tax-exempt status to two private colleges

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[12] (...continued)
discrimination. Those tests, as demonstrated herein, establish that the receipt of even substantial and essential public funding does not render an otherwise private action that of the State.

that maintained racially discriminatory enrollment policies. The Court's analysis there began with the determination that Congress, in enacting the Internal Revenue Code, intended that tax-exempt institutions must, in addition to fitting into one of the categories enumerated in the relevant Code provisions, "serve a public purpose and not be contrary to established public policy." *Id.* at 586. This Court then found that racial discrimination in education violates "a most fundamental national public policy." *Id.* at 593. Private colleges that practice racial discrimination cannot, it followed, enjoy tax-exempt status.

While there is no doubt that the racially discriminatory policies espoused by the two institutions in *Bob Jones* "violate[d] deeply and widely accepted views of elementary justice," *id.* at 592, this Court's threshold determination that tax-exempt institutions must "demonstrably serve and be in harmony with the public interest," *id.*, met with some skepticism, even among the members of the Court.[13] Critics charged that the Court had given little guidance regarding the scope and application of the public policy requirement and warned that the *Bob Jones* opinion might herald a new era in which private institutions would be required to conform with mainstream ideology in order to retain their tax-exempt status.[14]

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[13] See *Bob Jones*, 461 U.S. at 608 (Powell, J., concurring) ("I am unconvinced that the critical question in determining tax-exempt status is whether an individual organization provides a clear 'public benefit.'"); *id.* at 618 (Rehnquist, J., dissenting)("I reject the Court's heavyhanded creation of the requirement that an organization seeking [tax-exempt] status must '"serve and be in harmony with the public interest."') (citation omitted).

[14] See, *e.g.*, Note, *The Independent Sector and the Tax Laws: Defining Charity in an Ideal Democracy*, 64 S. Cal. L. Rev. 461, 476, 477, 478 (1991)(noting the "uncertainty of the [*Bob Jones*] decision" in which "the (continued...)

Yet *Bob Jones* has had no such impact. Neither the IRS nor the lower courts have read the decision as an invitation to apply the public policy requirement to deny tax exemptions in circumstances beyond those that closely parallel the circumstances encountered in *Bob Jones*.[15]

That the *Bob Jones* public policy requirement has fostered limited change in the status of tax-exempt

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[14] (...continued)
reach of [the public policy] test was not clarified," and speculating that *Bob Jones* may "result in the compromise of the pluralistic character of our charitable organization structure" and lead to "arbitrary and narrow determinations that in turn will defeat freedom of choice"); Steven R. Swanson, *Discriminatory Charitable Trusts: Time for a Legislative Solution*, 48 U. Pitt. L. Rev. 153, 165 (1986)(noting that the "*Bob Jones University* test . . . probably will not provide a satisfactory solution to the problem" of deciding whether an activity violates public policy); Francis R. Hill and Barbara L. Kirschten, *Federal and State Taxation of Exempt Organizations* § 2.03[6] (1994) (noting "the absence of specific guidance" in the area of public policy requirements for tax-exempt organizations and warning tax advisors to proceed with "extreme caution"); *Bob Jones*, 461 U.S. at 612, 609 (Powell, J., concurring) (observing that the *Bob Jones* holding left unanswered "[m]any questions" such as "whether organizations that violate other policies should receive tax-exempt status" and that the public policy requirement "ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints").

[15] The IRS and courts have tended to limit their application of the *Bob Jones* public policy requirement to the context of racial discrimination. See, *e.g.*, IRS Priv. Ltr. Rul. 8910001 (Nov. 30, 1988) (denying exempt status to trust limiting its beneficiaries to "worthy and deserving white persons" over the age of 60); *Virginia Educ. Fund v. Commissioner*, 85 T.C. 743 (1985) (revoking tax-exempt status of a fund for racist private schools), *aff'd*, 799 F.2d 903 (4th Cir. 1986); *Prince Edward School Found. v. Commissioner*, 478 F. Supp. 107 (D.D.C. 1979) (revoking tax exempt status of nonprofit private elementary school and high school due to racist policies), *aff'd mem.* (D.C. Cir. 1980), *cert. denied*, 450 U.S. 944 (1981).

organizations is not surprising in light of the constraints on the requirement set forth in the opinion. This Court warned that the determination of public policy is a "sensitive matter[] with serious implications for the institutions affected" and repeatedly cautioned that a declaration that a private institution contravenes public policy should be made "only where there is no doubt that the organization's activities violate fundamental public policy." *Bob Jones*, 461 U.S. at 592, 598. It acknowledged that its lack of doubt that racial discrimination violated public policy was singular, noting that "[f]ew social or political issues in our history have been more vigorously debated and more extensively ventilated." *Id.* at 595. Finally, it clearly set forth the basis for its determination that racial discrimination by educational institutions violates public policy: an "unmistakably clear" concordance between "all three branches of the Federal Government" (*id.* at 598) that racial discrimination must be eradicated, manifested by an "unbroken line of [this Court's] cases" and "myriad Acts of Congress and Executive Orders" spanning over a quarter-century. *Id.* at 593.

The single-gender admissions policies of private colleges thus are not jeopardized by the *Bob Jones* public policy requirement. The three branches of the federal government have not, acting independently or in concert, articulated a position against, much less launched a crusade to dismantle, private single-sex colleges. No court has questioned the constitutionality of private undergraduate single-gender colleges or drawn any adverse conclusions about the pedagogical or social worth of single-gender educational opportunities. No statement or order by the executive branch has condemned the policies offered by such institutions to justify their place in the educational marketplace. And Congress has passed no law that undermines the viability or questions the value of single-sex private higher education.

Indeed, the clearest evidence that the federal government considers private single-gender colleges worthy of preserving is Title IX of the Education Amendments of 1972. 20 U.S.C. §§ 1681 *et seq.* Title IX, which prohibits sex discrimination "under any education program or activity receiving Federal financial assistance," specifically exempted from its purview private institutions of undergraduate higher education. 20 U.S.C. § 1681(a)(1).[16] Thus, while Congress assured that both males and females would have equal educational opportunities at public and private professional, graduate, and vocational schools and public undergraduate schools, it specifically recognized that private institutions offering single-gender undergraduate educational opportunities should be preserved.

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[16] Section 1681(a)(1) provides:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that ... in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education."

Thus, § 1681(a)(1) of Title IX excludes the admissions policies of single-gender private colleges altogether. By contrast, § 1681(a)(5) governs single-gender public institutions and grandfathers "any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex."

Accordingly, while the creation of a new single-gender public college is prohibited by § 1681(a)(5) of Title IX, since such a new institution could not be "grandfathered," a new private single-gender college may be established today without violating the statute.

In short, there is no "fundamental public policy" or "declared position of the whole Government" which the maintenance or establishment of private single-gender undergraduate college programs contravenes. *Bob Jones*, 461 U.S. at 594, 599. Moreover, whatever the pedagogical evidence, if any, supporting single-gender education for males, the evidence is clear and well-established that single-sex education for women is particularly effective in preparing them for leadership and success, generally, and in male-dominated fields, more particularly. See Statement of Interest, *supra*. A private VMI, then, like private women's colleges, would enjoy tax-exempt status as long as it could show - as women's colleges can - a valid pedagogical purpose consistent with public policy.

CONCLUSION

For the reasons set forth above, *VMI II* should be reversed. It should be reversed because VMI is a public institution that does not pass constitutional muster under the standard articulated in *Mississippi University for Women*, and as a public, state-supported college it must meet that standard. In reversing *VMI II*, however, the Court should make clear that the demise of VMI's male-only admissions policy does not undermine the strength and viability of private women's colleges.

Respectfully submitted,

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Nos. 94-1941 and 94-2107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA

Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICI CURIAE* INDEPENDENT WOMEN'S FORUM, WOMEN'S ECONOMIC PROJECT, DIANA FURCHTGOTT-ROTH, LINDA CHAVEZ, LYNNE V. CHENEY, CHRISTINA HOFF SOMMERS, ABIGAIL THERNSTROM IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE*

The Independent Women's Forum (IWF) is a nonprofit, nonpartisan organization founded by women to foster public education and debate about social and economic policies, particularly those affecting women and families. IWF sup-

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* Letters reflecting written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

ports policies that promote individual responsibility, limited government and economic opportunity.

In April 1993, in an earlier phase of this case, IWF (then known as Women's Washington Issues Network) filed a brief *amicus curiae* in support of the petition for certiorari by the Commonwealth of Virginia and Virginia Military Institute, now Respondents and Cross-Petitioners. In its earlier brief, IWF argued that single-sex educational institutions are an important element in achieving a State's educational mission, that States should be able to tailor educational programs to respond to the distinctive needs and interests of each sex, and that single-sex education should continue to remain eligible for public funding and support.

The names and interests of other *amici* are set forth in the attached Appendix. Many of the individual *amici* are current or former teachers or otherwise active in the field of education. Among the approximately 550 members of IWF many are graduates of all-female schools, and many have family members who have attended single-sex schools. *Amici* strongly believe that single-sex education is an effective and beneficial pedagogical tool, which should be available for both male and female students and in both publicly and privately supported institutions.

SUMMARY OF ARGUMENT

The legal standard set forth in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982), applies to single-sex admissions policies in state-supported schools. The *Hogan* test requires "showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)." 458 U.S. at 724.

In this case the fourth circuit court of appeals has twice affirmed the district court's findings that single-sex educational programs are pedagogically justified and substantially related to achieving an important governmental objective, namely, providing the Commonwealth's citizens a diverse array of educational opportunities. *United States v. Commonwealth of Virginia*, 976 F.2d 890, 897-98 (4th Cir. 1992) (VMI I); *see also United States v. Commonwealth of Virginia*, 44 F.3d 1229, 1239 (4th Cir. 1995) (VMI II). There is no reason, either factual or legal, why this Court should set aside those findings.

Every State has a strong, legitimate interest in providing its citizens a system of education that is both educationally and economically sound. In deciding whether and to whom they will offer specialized educational programs States should be permitted to make reasonable allocations of their resources. The Equal Protection Clause does not deny States the power to treat different classes of persons differently, nor does it require States to confer benefits on all classes equally or equivalently.

The *Hogan* standard imposes an "intermediate" level of scrutiny on sex-based school admission policies. Petitioner has argued in its opening brief in No. 94-1941 that "strict scrutiny is, in fact, the correct constitutional standard for evaluating differences in official treatment based on sex." (U.S. Br. 33) Accepting petitioner's argument would be an unwarranted and unwise departure from this Court's precedents.

Racial classifications are subject to strict scrutiny because we regard racial differences as purely superficial. Differences between men and women, however, are real and substantial. Applying strict scrutiny to gender classifications would be unreasonable and unfair to both sexes. The judgment of the court below applying the "intermediate scrutiny" *Hogan* standard should be affirmed.

ARGUMENT

I. The Equal Protection Clause Permits States To Offer Single-Sex Educational Programs If The Programs Are Substantially Related To The Achievement Of An Important Governmental Objective.

In VMI I, the fourth circuit appeals court acknowledged the practical difficulty of interpreting the Equal Protection Clause.

> The obvious appeal to fairness in requiring the equal application of law too often becomes entangled with generalized notions of equality as referred to in Lincoln's Gettysburg Address and, before that, the Declaration of Independence, and these generalizations tend to overwhelm the difficult task of deciding what is meant by equal protection. We recognize that all persons are in many important respects different and that they were created with differences, and it is not the goal of the Equal Protection Clause to attempt to make them the same. To apply law to different persons with a mind toward making them the same might result, among other things, in the unequal application of the law. Thus, no one suggests that equal protection of the laws requires that all laws apply to all persons without regard to actual differences. *See Jenness v. Fortson*, 403 U.S. 431, 442, 91 S. Ct. 1970, 1976, 29 L. Ed. 554 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were actually alike. . . .").

VMI I, 976 F.2d at 895 [footnotes omitted].

The difficulty becomes most evident in cases involving classifications based on sex. It is easy to accept the proposition that a person's race or ethnic origin bears no relation to the person's character, abilities or performance; therefore a classification based on race or ethnic origin is inherently suspect – that is, it is assumed to be unjustified and most likely unjustifiable. Sex-based classifications, on the other hand, are

sometimes justified and sometimes not. Men and women share many of the same human characteristics and in many ways are equally capable, but men and women also differ in significant ways. To compound the difficulty, male and female children have differences and similarities that change as they mature into adults.

To apply the Equal Protection Clause intelligently in the case of a gender-based classification, one cannot assume, as one does in the case of race, that the classification is in all likelihood unjustified. Because there are real differences between men and women, a particular law treating them differently might be entirely justified. The only fair way to proceed is to undertake an open-minded inquiry into the substance and purpose of the classification. This is no easy task, as the fourth circuit court and many other courts have remarked, but any other approach would be dishonest and would violate common sense.

Mississippi Univ. for Women v. Hogan, 458 U.S. 718, is the controlling precedent for this case. *Hogan* involved the single-sex admissions policy of a state-supported college. The Court held in *Hogan* that the party seeking to uphold a gender-based classification must show "an exceedingly persuasive justification" for it. Under *Hogan*, a gender-based classification can be justified if it is substantially related to the achievement of important governmental objectives. *Id.* at 724.

VMI's admissions policy, having been exhaustively examined in two trials and two appeals, meets the *Hogan* standard. The Commonwealth's objective has been to provide for the needs of a broad range of students at the post-secondary level. In VMI I, the appeals court accepted the district court's findings of fact, specifically including a factual determination that "single-sex education is pedagogically justifiable, and VMI's system, which the district court found to include a holistic formula of training, even more so." 976 F. 2d at 898.

The appeals court found, however, that the Commonwealth had "failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type of education to men and not to women." *Id.* at 900. To remedy this deficiency the Commonwealth, in partnership with VMI and Mary Baldwin College, established the Virginia Women's Institute for Leadership (VWIL) program, which incorporates the transferable elements of VMI's system together with elements aimed at the developmental needs of young women.

After a second trial to evaluate the sufficiency of VWIL as a remedy, the appeals court held, in VMI II, that it is a legitimate and important government objective to provide single-sex education as one option within a publicly financed system of education. It also affirmed that the single-sex programs at VMI and VWIL are substantively comparable and will operate so as not to exclude either sex from the benefits of a leadership-oriented "VMI-type" of education.

After two full rounds of trial and appeal below, there can be no doubt that Virginia's system of higher education, which now includes single-sex programs for both male and female students, complies with Equal Protection Clause requirements as articulated in *Hogan*. Petitioner supports its arguments to this Court with a few colorful or offhand statements painstakingly extracted from the record. As respondents' briefs show, these isolated remarks mischaracterize the weight and authority of the testimony by numerous highly qualified experts at two separate trials.

Petitioner invariably condemns as a "stereotype" any fact that interferes with petitioner's preconceived idea about the "correct" outcome of this case. Respondents, on the other hand, have followed *Hogan* and taken its mandate seriously at every step. They have done the hard work of examining their goals and methods, gathering data and expert opinions, studying the options, and justifying their final decision. The outcome – a pedagogically sound and useful program that

fulfills real needs – is where the *Hogan* standard has led them. This Court should affirm the application of the *Hogan* standard in this case so that there will be no future doubt that other States may in a similar manner offer and support single-sex programs among an array of educational methods.

II. States Should Be Allowed To Determine How Best To Allocate Their Educational Resources.

This Court has granted respondents' cross-petition for certiorari on the question whether the Equal Protection Clause, as it was interpreted by the fourth circuit court of appeals, requires states to offer parallel single-sex educational opportunities for both sexes. *Amici* agree with respondents that this question should be settled by this Court's confirming that *Hogan* does not impose any such additional requirement.[1]

Under the existing *Hogan* standard, States must provide an exceedingly persuasive justification for gender classifications by showing that they are substantially related to achieving an important governmental objective. 458 U.S. at 724. If a State statute or action benefits one sex without hurting the other, it is unnecessary to consider the interest of the excluded sex at all.[2] If a State statute or action benefits one sex to the detriment or disadvantage of the other, it may be necessary to consider the interest of the excluded sex, but there may still be "exceedingly persuasive justification" to pursue the program for the benefit of the one sex.[3] If a case arises in

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[1] Respondents have committed themselves to support both the VMI and VWIL programs even if this Court holds that parallel programs are not required when a State offers a single-sex program for either sex. (Va. Opening Br. 3 n.1)

[2] For example, there is no real male parallel to a program for pregnant women.

[3] For example, "boot camp" programs to rehabilitate criminals might be prohibitively expensive if they had to be duplicated for both men and

which fairness dictates parallel programs for both sexes, following the existing *Hogan* standard will reveal this shortcoming: either the objective or the means of achieving it will prove to be faulty under an intermediate scrutiny analysis. We should not assume, as a matter of law, that for every gender-related action there must be an equal and opposite reaction.

In the case of education especially, States should be entitled to consider need, demand and economies of scale when determining whether and to whom they will offer specialized programs. Every child is different from every other child. In an ideal world, to ensure that every child received a perfect education, we probably would assign each one a personal tutor. In the real world, States and localities struggle to allocate limited resources in a way that will provide suitable educational opportunities for most children. The *Hogan* standard should permit States to make reasonable economic decisions relating to the mix of educational opportunities and should not impose additional conditions to achieve a formalistic parallelism for its own sake.

III. The Court Should Not Apply Strict Scrutiny To Gender Classifications.

Petitioner has argued in its opening brief in No. 94-1941 that the Court should adopt for gender classifications the same standard now applicable to race classifications, that is, strict scrutiny. (U.S. Br. 33) The Court should explicitly reject the Petitioner's argument and instead affirm the decision

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women. Rather than limit the choice to "both" or "neither," the Equal Protection Clause should allow states to balance the costs and benefits to all their citizens. Thus, for example, a state might be able to deny female criminals access to a costly parallel program so that society as a whole could obtain the benefit of rehabilitating possibly larger numbers of more violent male criminals.

below by reiterating the standard the Court laid out in *Hogan*, 458 U.S. at 724.[4]

Prior decisions of this Court specifically acknowledge the difference between race and gender classifications and the substantial reasons for those differences. In *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985), the Court stated the "general rule is that legislation is presumed to be valid, and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." In those cases "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Id.* The Court then continued:

> The general rule gives way however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others. For these reasons, and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny, and will be sustained only if they are suitably tailored to serve a compelling state interest.

Id. The Court then further contrasted the levels of scrutiny given to race and gender classifications, quoting from *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion):

> [W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.

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[4] The Court most recently invoked the *Hogan* standard in *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1424-25 (1994).

Rather than being "deemed to reflect prejudice and antipathy," laws treating the sexes differently "very likely reflect outmoded notions of the relative capabilities of men and women." *Cleburne*, 473 U.S. at 441.

Despite the fact that mental retardation is an immutable characteristic, beyond the individual's control, affecting a small and readily observable minority who, now and in the past, have been subjected frequently to invidious discrimination, the Court would not upgrade the level of scrutiny applied to this type of legislative classification.

> [I]t would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large.

Id. at 445. Likewise, if gender were deemed a "quasi-inherently suspect" classification, it would be difficult to find a principled way to recognize in law the real differences between the sexes.[5]

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[5] Petitioner and its *amici* have argued that the Court should declare gender an "inherently suspect" classification "to remove any remaining ambiguity" (U.S. Br. 35), "to eliminate confusion in the lower courts, and to resolve serious inconsistencies in the law resulting from this Court's decisions in *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion)" (Brief of *Amici Curiae* National Women's Law Center, *et al.*, 5). Petitioner and its *amici* are mistaken. Ratcheting up the level of scrutiny given to "gender" cases will not produce better informed and better reasoned opinions. Instead it will prompt courts to declare gender classifications *per se* invalid, regardless of the existence of merely "important" state interests supported by only "substantial" rationales. Worse, the prospect of litigation will chill state action, so that programs legitimately aimed at helping one sex (usually women) will simply cease to be adopted.

This Court should not depart from the standard it has followed in every gender-based equal protection case since at least *Craig v. Boren*, 429 U.S. 190 (1976). Indeed, adopting strict scrutiny would directly conflict with this Court's prior decisions applying an intermediate standard to uphold gender-based classifications.[6]

As the Court has noted, "any departure from the doctrine of *stare decisis* demands special justification." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).[7] Petitioner, however, offers no special justification other than its own conclusion that strict scrutiny is the "correct" standard. (U.S. Br. 33) Petitioner observes that sex, like race, is an immutable and visible characteristic; that the government still employs gender stereotypes in decision making; that historical parallels between official discrimination affecting women and racial minorities exist; and that women suffer "relative political powerlessness." (U.S. Br. 34-36) None of these observations suggests that the Court ought to abandon its firmly established approach to gender classifications. Significantly, petitioner does not argue that intermediate scrutiny is inadequate to address invidious discrimination against women.

In fact, no special justification exists, because intermediate scrutiny is an appropriate standard of review. It subjects gender classifications to a meaningful, "heightened" review while recognizing that differences between men and women – unlike the differences between members of different races – will justify gender classifications in some circumstances.

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[6] *See Heckler v. Mathews*, 465 U.S. 728 (1984); *Michael M. v. Superior Ct.*, 450 U.S. 464 (1981); *Parham v. Hughes*, 441 U.S. 347 (1979); *Califano v. Webster*, 430 U.S. 313 (1977); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974).

[7] This is especially true in the context of a long-established precedent. *See generally Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2808-16 (1992).

Bearing in mind that "proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause,"[8] we nevertheless offer some statistics to rebut petitioner's unsupported observations.

Women are not politically powerless. Unlike racial minorities, women constitute a majority of the population of the United States; as of 1994, women outnumbered men 51.2% to 48.8%.[9] In the voting age population, women not only outnumber men but consistently register and vote in higher proportions than men.[10] Women already have the political power to elect women to represent them; indeed if all women voted the same and chose to elect only women, virtually every elected office in the United States could be filled by a woman. Instead, women exercise their franchise as individuals and vote for candidates, male or female, as a matter of individual choice.

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[8] *Craig v. Boren*, 429 U.S. at 204.

[9] U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 21, Table 21 (1995) [hereinafter "STATISTICAL ABSTRACT"].

[10] *Id.* at 289, Table 459. About 52% of women report that they are Democrats versus 37% Republicans, with 10% described as independents and 1% as apolitical. Among men, 46% describe themselves as Republicans, 43% as Democrats, 11% as independents, and 1% as apolitical. Id. at 288, Table 458. Women constitute a minority of members of the U.S. Congress, but between 1981 and 1995 their numbers increased from 19 to 47 in the House of Representatives, and from 2 to 8 in the Senate. *Id.* at 281, Table 444. In 1995, there were 84 women in statewide elective office (not including elected judges and elected members of university boards or boards of education) and 1,535 in state legislatures. *Id.* at 285, Table 453. As of 1992, there were over 100,000 women in local elected offices. *Id.* Table 452.

Women are not excluded from the workplace. Overall, women constitute over 45.9% of the civilian labor force in the United States. Among women of all ages, 58.8% work outside the home, versus 75.1% of men. Among those aged 25-54, about 74% of women and 89% of men work outside the home.[11]

Women are not compensated less merely because of their sex. The ratio of female-to-male, year-round full-time earnings was 71 cents on the dollar in 1992. This includes workers of all ages. Among younger workers (ages 25-34) the ratio was 82 cents on the dollar, versus 67 cents for older workers (ages 55-64). "[S]erious economics scholars who are trained to interpret these data (including many eminent female economists) point out that most of the differences in earnings reflect such prosaic matters as shorter work weeks and lesser workplace experience."[12] An "apples-to-apples" comparison yields even more encouraging results. According to research by former Baruch College economics professor, now Congressional Budget Office director, Dr. June E. O'Neill, "among people 27 to 33 who have never had a child, the earnings of women in the National Longitudinal Survey of Youth are close to 98% of men's."[13]

Women are not relegated to the "worst" jobs. Women and men make different career choices, but women's career opportunities are not invariably inferior to men's. According to 1994 Bureau of Labor Statistics reports, women represent 48.1% of workers in executive, administrative and managerial jobs. Women are 61.6% of personnel and labor relations managers, and 79.7% of health and medicine managers. Women are 64.3% of workers in technical, sales and admin-

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[11] *Id.* at 399, Table 627.

[12] CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM? 240-41 (1994).

[13] June E. O'Neill, *The Shrinking Pay Gap*, WALL ST. J., Oct. 7, 1994, at A14.

istrative support, and 59.6% of workers in service occupations. Women have low representation in production, craft and repair industries (9.3%), among machine operators and laborers (24.3%), and in farming, forestry and fishing (19.3%). These categories include some of the fastest declining occupations, as projected by the Bureau of Labor Statistics for 1992-2005.[14]

Women are not excluded from educational and professional opportunities. In recent years women have steadily increased their representation in the professions and in educational achievement generally. As of 1994, women were 22.3% of physicians, up from 15.8% in 1983, and 24.8% of lawyers and judges, up from 15.8% in 1983.[15] In 1992, 35.7% of M.D. degrees and 42.7% of J.D. degrees were conferred on women.[16] Between 1971 and 1992, the percentage of bachelor's degrees conferred on women rose from 43.4% to 54.2%, from 40.1% to 54.1% for master's degrees, and from 14.3% to 37.1% for doctorate degrees.[17]

Women are not prevented from owning their own businesses. According to the Small Business Administration, between 1980 and 1990, the number of women-owned businesses increased from about 2,000,000 with $25 billion in sales to more than 5,000,000 with over $80 billion in sales. In the same period, when the overall number of business owners increased by 56%, the number of women business owners increased 82%.[18]

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[14] STATISTICAL ABSTRACT, *supra* note 9, at 415, Table 651. Perhaps this is bad news for women, but it is worse news for men.

[15] *Id.* at 411, Table 649.

[16] *Id.* at 192, Table 302.

[17] *Id.* at 190-91, Tables 300-301.

[18] Elizabeth Larson, *Victims in the Workplace*, INVESTOR'S BUSINESS DAILY, June 2,1995.

The term "strict scrutiny" implies that it imposes a more demanding burden of proof than "intermediate scrutiny." In practice, it operates as a presumption of invalidity. The progress made by women in the last generation and the success that increasing numbers of women enjoy today rebut any assertion that they require "strict scrutiny" to protect their interests. Indeed, rather than asking the Court to adopt strict scrutiny as the standard for reviewing gender classifications, a more honest approach would be to ask the Court to take this opportunity to declare women emancipated – to affirm that women are human beings and citizens, with all the rights and responsibilities that entails.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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December 15, 1995

APPENDIX

The Women's Economic Project is a committee formed under the auspices of the Independent Women's Forum. Its members are women who are professional economists. The Women's Economic Project advises and assists IWF in analyzing and evaluating census, survey and other data relating to women in the economy.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF AMICI CURIAE OF THE CENTER FOR MILITARY READINESS, FAMILY RESEARCH COUNCIL, THE MINNESOTA FAMILY COUNCIL, CONCERNED WOMEN FOR AMERICA, THE MADISON PROJECT, EAGLE FORUM, FREE CONGRESS FOUNDATION AND THE NORTHSTAR LEGAL CENTER IN SUPPORT OF RESPONDENT COMMONWEALTH OF VIRGINIA

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INTEREST OF AMICI

Amici are educational groups concerned about the impact of strict scrutiny for sex classifications on military readiness and family law. Amici support the Commonwealth of Virginia and VMI in this case.

SUMMARY OF THE ARGUMENT

This Court should reject the Government's aside that it use this case to break new constitutional ground and declare sex a suspect class. For the past twenty years, this Court has applied a "carefully developed" intermediate standard of review to sex-based classifications. *Michael M. v. Sonoma County Superior Court,* 450 U.S. 464, 489 n.2 (1981) (Brennan, J., dissenting). This Court always has recognized that race and sex are different and, therefore, that they pose different questions under the Equal Protection Clause. This is because, unlike sex-based classifications, "racial classifications by government always violate the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated." *Michael M.,* 450 U.S. at 477. In short, race and sex have not been, and should not be, treated the same under the Constitution for the simple reason that race and sex are not the same. *Id.* at 477-78. Thus, the more rigid approach that inheres in strict scrutiny not only is not required by the Constitution for sex-based classifications, it is not appropriate. Besides the gaping holes in logic and lack of legal portfolio for the Government's theory on "strict scrutiny," twenty years after it first fashioned intermediate scrutiny, and more than a decade after the nation as a whole rejected strict scrutiny for sex classifications by rejecting the federal ERA, it frankly would be unseemly for this Court to surmise today that the Constitution requires a stricter

standard.

Indeed, even in this case the Government does not criticize the intermediate test as unworkable, defective, or a failure in protecting certain groups, in any way. The potential mischief in any attempt strictly to equate sex and race, or the sexes, is seen in its impact on judicial deference to military policy choices and in larger questions now reserved to the States.

ARGUMENT

I. The impact of strict scrutiny for sex-based classifications on military policy choices counsels strongly against eliminating the well-established standard of intermediate scrutiny.

Today the United States asks this Court to break new constitutional ground. It appeals strongly for the right to subject legislative classifications based on sex to the law's strictest scrutiny.

This Court repeatedly has emphasized that separation of powers concerns militate against the creation of new protected classes.[1] *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 441-42 (1985). This caution particularly is apt when the classification arises in the military setting. *See, e.g., Brown v. Glines,* 444 U.S. 348, 354-55 (1980), *Weiss*

[1] This Court repeatedly has refused to create new suspect classes. *See, e.g., Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 313 (1976) (elderly); *Cleburne,* 473 U.S. at 442 (mentally retarded); *Lyng v. Castillo,* 477 U.S. 635, 638 (1986) ("close relatives"); *Bowen v. Gilliard,* 483 U.S. 587, 601-03 (1987) ("families"); *Johnson v. Robison,* 415 U.S. 361, 375 n.14 (1974) (conscientious objectors).

v. United States, 114 S. Ct. 752 (1994). It is well-settled that judicial deference---that is, deference in addition to the deference that inheres in the rational basis test itself--- "is at its apogee when reviewing congressional decision-making in [the military context]." *Id.* at 760-61. Indeed, it is Congress, not the Judicial Branch, that has the explicit and exclusive constitutional prerogative to "raise and support Armies [and to] make Rules for the Government and Regulation of the land and naval forces." Article I, section 8, UNITED STATES CONSTITUTION.

Thus, the judiciary always has accorded great deference to military decisions, on the separation of powers ground, that "ultimate responsibility for [the armed forces] is appropriately vested in branches of the government which are periodically subject to electoral accountability." *Gilligan v. Morgan,* 413 U.S. 1, 10 (1973).

The matters underlying the judicial principle of deference to military policy choices, then, are too weighty to be disposed of by a footnote, as the Government attempts to do. Br. for Pet. at n.23. The plain reality is that the Government's invitation to impose strict scrutiny on sex-based classifications will---indeed, philosophically, *must*---affect both the judiciary's role in military policy-making and, ultimately, military policy.[2] It cannot be gainsaid that the Government today asks this Court to take a big step, that of

[2] Although the Government relies on its steadfast contention that the instant case is not a military case, Br. for Pet. at n.23, that contention is quite beside the point. What the Court decides today immediately will affect policy and policy debates within the armed forces. *See, e.g., Baker v. United States, infra* note 6 (discussing application of strict scrutiny of sex-based classifications to a "reverse discrimination" claim brought by male colonels and pending in the United States Court of Federal Claims).

creating a new suspect classification subject to strict scrutiny. As always, but especially here where this new standard would implicate strongly a venue committed wholly to a coordinate branch of government, it is imperative to look hard before one leaps.

A. The impact of strict scrutiny on military policy choices

Plainly, as detailed below, the principle of strict scrutiny, applied to sex-based classifications, is in tension---if not outright conflict---with judicial deference to military decisions. These policies reflect, what might be called in the vernacular, the facts of life. And how society arranges itself in regard to those facts, to a large degree, reflects social consensus, arrived at through the constantly fine-tuned social contract that is the object of democracy. For example, the Government cites privacy considerations that are furthered by providing separate quarters and bathroom facilities for men and women. It then states, in conclusory fashion, this separate treatment furthers compelling governmental interests. Br. for Pet. at n.25.

The Government's conclusion regarding its compelling interests in individual privacy may have merit, but it is at least untried.[3] Moreover, the fact the Government felt

[3] If the Government does have a compelling interest in how society arranges itself in regard to cognizable differences between men and women, the Government's charter goes back to that social consensus, not to the Constitution. Plainly, the question of whether it is appropriate to provide "separate arrangements for men and women while sleeping and while using bathroom and shower facilities" is a quintessential social question based on the fact there exist cognizable differences between men and women that do not exist between members of various races. If the social consensus changed tomorrow---and under this new contract "gender privacy" was deemed a social evil---the Government's claim to a

compelled to style separate quarters for men and women as furthering a compelling governmental interest itself demonstrates that matters of general social consensus must be revisited if strict scrutiny is applied to sex-based classifications.

Indeed, the government's own analysis proves why it asks too much when it invites this Court to apply strict scrutiny to policy choices that reflect distinctions based on sex. What the government gives, it immediately takes away.

The entire practical and analytical problem posed by ratcheting sex-based classifications up to strict scrutiny is encapsulated in footnote 25 of the Government's brief:

> Strict scrutiny of . . . classifications based on sex will not necessarily be "fatal in fact." For example, where discrimination persists, "government is not disqualified from acting in response to it." *Adarand Constructors, Inc. v. Pena,* 115 S. Ct. 2097, 2117 (1995). The compelling interest in respecting individuals' privacy would clearly justify separate arrangements for men and women while sleeping and while using bathroom and shower

compelling government interest in separate showers for men and women might ring hollow. *See, e.g.*, Wendy Shalit, A Ladies' Room of One's Own, Commentary at 33 (Aug. 1995). The point is not whether the policy-maker might show a compelling reason for differentiating between men and women in any given factual setting. Rather, the point is that strict scrutiny would *require* such a reason in *every* setting, and that requirement is unwarranted, both because the underlying distinctions are rational more often than not and because the Constitution leaves these common sense matters---and the right to change their collective mind regarding them---to the people.

facilities. Br. for Pet. at n.25.

Clearly, the Government seeks a rule that sows the seeds of its own destruction. To work, the law would be required to keep in perfect tension, much like juggling four pins in the air at all times, at least these tenets:

- Because distinctions between men and women are irrational *per se*, strict scrutiny is required for policy choices that reflect distinctions between men and women.[4]

- Moreover, strict scrutiny requires *individualized* scrutiny. That is, policies that reflect distinctions between men and women fail strict scrutiny, for example, if one woman does not conform to the characteristics of the class as a whole.[5]

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[4] Br. for Pet., *e.g.*, at 44-45.

[5] *Id.* Plainly, the rule of law presupposes the creation of categories. *See, e.g., Massachusetts Bd. of Retirement,* 427 U.S. at 314. *Imposition of strict scrutiny, however, presupposes the relevant category is illicit.* Therefore, it is incumbent on the policy-maker to make wholly individualized determinations regarding members of the class for whom classifications are strictly scrutinized. In other words, as the Government argues, Br. for Pet. at 44-45, it would be impermissible ever to make policy choices based, *e.g.*, on the fact that "job related physical requirements would necessarily exclude the vast majority of women Service members." Note 20 and accompanying text, *infra.* Indeed, the Government argues that VMI's admission policy fails strict scrutiny because:

> [The lower] court . . . did not purport to find---nor could [it] possibly have found---that *all* women are less aggressive or less confident than *all* men, or that VMI's program was educationally inappropriate for *all* women. . . . The court . . . approved the VWIL program on the premise that *average* psychological and sociological

- But, if the Government determines that "discrimination persists," the Government can impose sex-based policies (such as affirmative action) to respond to that discrimination, and, moreover, to respond to it on a class-wide basis without regard to the merit of any individual in the favored or disfavored class.[6]

> differences between the sexes can justify denying *all* women admission to an educational program that some fully qualified women want to enter. . . . Women whose choices or abilities are different from those of the "typical" or "average" woman cannot be denied an important educational opportunity . . . solely because most women would not be inconvenienced by that limitation.

Br. for Pet. at 44-45 (original emphasis). Thus, even if the vast majority of women, for example, cannot meet standards for a particular position, the Government urges that policy-makers nevertheless are required by the Constitution to attempt to find that one woman who does meet standards (or, in point of fact, to "gender-norm" the standards) and then, regardless of cost to the organization, to accommodate her in that position. This elaborate "logic" has no analogue in questions regarding race-based classifications---precisely because this "logic" is without portfolio from the Equal Protection Clause. *Cf. Mathews v. Eldridge,* 424 U.S. 319, 332 (1976) (one factor in the due process analysis is "the Government's interest, including the *function involved* and the *fiscal and administrative burdens*" entailed in the policy choice) (emphasis added).

[6] *See, e.g., Baker v. United States* (No. 94-453C United States Court of Federal Claims). *Baker* was brought by 83 white male colonels who were selected by an administrative board for involuntary early retirement from the Air Force in 1992. The secretarial memorandum of instruction to the board required the board, upon completing its selections for involuntary retirement, to render a report concerning the selection rate for minorities and women. The board's report to the Secretary indicated the files of minority and female officers had received preferential treatment in determining which officers would be involuntarily retired and which would continue on active duty.

In its supplemental motion for summary judgment in *Baker*, the United

- And, finally, even though strict scrutiny is required

States informed the court in a footnote:

> The Government's November 16, 1995 brief in United States v. Commonwealth of Virginia, 94-1941 (U.S.), asserts that strict scrutiny should be applied to classifications that deny opportunities to individuals based upon their sex. In so doing, however, the Government's brief specifically distinguishes executive and legislative branch programs and policies having to do with the Federal Government's conduct and control of military affairs. As to military affairs, the Government's brief suggested that courts should continue to defer to executive and legislative branch judgments [citations omitted]. To the extent that our prior briefs argued that gender distinctions are subject, at most, to an intermediate level of judicial scrutiny * * * we withdraw that argument. As we have demonstrated, however, the military judgments implicated in this case deserve the judicial deference reflected in the above-cited cases, whatever level of scrutiny is applied.

Baker v. United States (No. 94-453C United States Court of Federal Claims) (Defendants' Supplemental Motion for Summary Judgment); *but cf.* note 9, *infra*.

Colonel Baker now argues, if strict scrutiny applies to sex-based classifications, first, such scrutiny is inconsistent with judicial deference to military policy choices and, secondly, his reverse discrimination claim now even is stronger since his selection for involuntary retirement was based, in part, on his sex.

This controversy is no small point, especially in light of the scope and magnitude of the various personnel decisions required to reduce the size of the United States armed forces from its Cold War high. *See, e.g.*, Karen Jowers, Women Have Been Treated Equally, Military Says, Air Force Times (Nov. 27, 1995) ("women have fared about the same as men in the reduction of the military forces during the drawdown, and sometimes better, military officials say. * * * In the Air National Guard . . . the number of women increased by two-tenths of a percentage point from fiscal 1993 to 1994, from 13.9 percent to 14.1 percent, although the Air Guard overall shrank by 3.1 percent during the period. * * * In the Marine Corps, 1.9 percent of the officers who were selected for [involuntary] retirement were women, even though women make up 3.6 percent of the Marine officer corps").

because distinctions between men and women are irrational *per se*, existing policy distinctions between men and women (such as separate quarters and bathroom and shower facilities) are permitted because the distinctions between men and women are compelling.[7]

It is not too strong to say, then, that what the Government urges is not strict scrutiny, as a controlling legal principle for reviewing sex-based policy choices, at all. Rather, it advocates simply for a larger constitutional writ to equalize various situations as it sees fit, not to provide equal protection under the law.

In essence, the Government advocates for a constitutional writ to impose strict scrutiny on policy choices that disfavor a favored group and to insulate from strict scrutiny policy choices that favor a favored group, upon no more principled basis than the notion of "it all depends on whose ox is being gored." But the real issue is whether the Constitution requires that the law must say that "what is good for the goose is good for the gander" *and mean it in every instance.*

The Government's view of "strict scrutiny" for sex-based classifications may regard a fashionable notion of "equalized" protection of the law, but it conforms nowhere to the Equal Protection Clause. At best, and this is not great, the practical result of the "strict scrutiny" urged by the Government is "intermediate scrutiny *plus*"---plus more lawsuits, plus more judicial intervention in the social contract, plus more confusion (if not plain incoherence) in the law. Either way, the outcome is not more beneficial, to either the regulated class or the law, than the flexibility to countenance common

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[7] Br. for Pet. at n.25.

sense distinctions between men and women that inheres in the present standard of review as intermediate scrutiny.

Indeed, it is *because* there exist legally and practically cognizable differences between men and women that, even as it urges this new standard of review, the Government attempts to attenuate the searching judicial inquiry that is part and parcel of strict scrutiny. It is counterintuitive to urge strict scrutiny---not only the highest standard of review known to the law, but, by its own philosophical design, a "hard and fast" rule---for policy choices based on sex, but then to argue that existing policy choices that reflect distinctions between men and women are supported by compelling governmental interests. This is a case where the proposed exceptions to the proposed rule prove the inadvisability of the rule in the first instance.

First, in this very case, the Government attempts to straddle the hard and fast view of strict scrutiny and the greater flexibility that inheres in intermediate review. It argues that the decision to exclude women from VMI fails strict scrutiny because distinctions between men and women are irrational *per se*. Br. for Pet., *e.g.*, at 44-46. But the Government also argues, once women are admitted to VMI, *based on distinctions between men and women*, the government has a compelling reason to "justify," for example, separate quarters and facilities for men and women. Br. for Pet. at n.25.

Likewise, unless the Government today urges a grand remodeling of society, not to mention the armed forces, the "strict scrutiny" advocated by the Government leaves policy-makers with much explaining to do. The Army's decision to

exclude women from certain military schools,[8] for example, hardly could withstand strict scrutiny since the application of that standard of review intrinsically concludes policy distinctions between men and women are irrational in the same way it is irrational to make distinctions between races. But, to follow the Government's reasoning, once women are admitted to those military schools, the distinctions between men and women that were irrational become so rational they give rise to compelling governmental interests that justify actually treating women differently than men.[9] Br. for Pet.

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[8] *See, e.g., Army Regulation* 611-201 at 13-15 (female soldiers may not attend the Infantry, Armor, or Special Forces School). Other schools or schooling may be closed to female soldiers based on the prerequisite of certain military occupational specialties. *See* note 11, *infra*.

[9] The Government is careful to concede only that "the phenomena of sex and race *discrimination* differ from each other in some important respects," all the while it claims *sex* and *race* are interchangeable for purposes of suspect classification. Br. for Pet. at 36; *see also* All-male VMI Faces Ruling: Supreme Court to Decide Whether the School Can Bar Women, Air Force Times (Oct. 23, 1995) ("[t]he Clinton administration says the only way to guarantee women equal treatment is to admit them to VMI. A separate 'women's VMI' begun this fall is as unlawful as segregated schools once created for blacks and whites, administration lawyers contend").

As the Government's theory in the instant case proves, however, the analogy between sex and race stops at the front gate. It would be grotesque to suggest the armed forces "clearly [could] justify separate arrangements for [blacks and whites] while sleeping and while using bathroom and shower facilities," yet just such a conclusion makes imminent good sense even to those advocating strict scrutiny for sex-based classifications. *See, e.g.*, Br. for Pet. at n.25; *cf.* Br. of *Amici* Cornum *et al.* at 14 ("[c]reating a separate barracks floor for women could maintain [VMI's adversative methodology] for men and impose the same [methodology] on the women vis-a-vis other women"); *see also, e.g., Rostker*, 453 U.S. 57; *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Michael M.*,(upholding sex-based classifications under intermediate

at n.25.

Under the rubric of strict scrutiny for sex-based classifications, this is the only reasoning---never mind that it is logically inconsistent and internally contradictory---that could allow the armed forces to continue to fashion sex-based distinctions that range from the sublime to the minute:

- to draft men and not women;[10]

- to involuntarily assign men, but not women, to direct combat positions;[11]

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scrutiny); *cf. also California Federal S. & L. Assn. v. Guerra,* 479 U.S. 464 (1981).

Why? Because sex and race have important and cognizable differences. Those differences, which all relate to cognizable differences *between members of the class based on sex,* render strict scrutiny workable for race-based classifications and unworkable for sex-based classifications.

[10] *See Rostker v. Goldberg,* 453 U.S. 57 (1981) (subjecting only men and not women to involuntary military service justified by the fact that only men were sent into direct combat); *Report of the Presidential Commission on the Assignment of Women in the Military [Commission]* (Aug. 28, 1992) at Findings 4.7-4.10 and 1.63 (Office of Secretary of Defense testimony was "women were not in combat in the Gulf War").

[11] The Army, for example, presently excludes female officers from the Armor, Infantry, and Special Forces branches. Army Regulation 611-201, *Military Occupational Classification and Structure* (1994) at 4. It also excludes enlisted women from 45 military occupational specialties, for example, 11C (Indirect Fire Infantryman), 11M (Heavy Antiarmor Weapons Infantryman), 12D (Engineer Tracked Vehicle Crewman), 13B (Multiple Launch Rocket System/Lance Operations/Fire Direction Specialist), 14B (Line of Sight-Forward-Heavy Crewmember), 18B (Special Forces Weapons Sergeant), 45D (Self-propelled Field Artillery Turret Mechanic), 45B (Bradley Fighting Vehicle System Turret Mechanic), and 63E (M1 ABRAMS Tank System Mechanic). *Army Regulation 611-201* at Table 4-1.

- to provide separate quarters and facilities for women;[12]

- to require women to run two miles in 18 minutes and 54 seconds and accomplish 50 sit-ups and 18 push-ups while men must run two miles in 15 minutes and 54 seconds and accomplish 52 sit-ups and push-ups;[13]

- to provide "non-chargeable" leave for mothers, but not fathers, after the birth of a child;[14]

- to permit women to curtail their enlistment at their request by reason of pregnancy while men have no comparable grounds to request to early discharge;[15]

- to find women fit for duty with up to ten percentage points more body fat than men;[16]

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[12] *See, e.g.,* note 20 and accompanying text, *infra.*

[13] Field Manual 21-20, *Army Physical Fitness Training* (1992) at Chapter 14; *see also, e.g.,* Jonathan T. Ullyot, A Lesson in Military History from The Citadel, Washington Times (Aug. 23, 1995) (women going through Officer Candidate School in the Marine Corps are provided special ramps to help them negotiate the obstacle course; men are required to march with their gear (increasing their rucksack weight by 30 pounds) while women march with empty rucksacks and their gear is trucked to the rifle range).

[14] Army Regulation 600-8-10, *Leaves and Passes* (1994) at 13.

[15] Army Regulation 635-200, *Enlisted Ranks Update* (1990) at 41-42 (pregnant soldiers granted discharge at their request).

[16] Army Regulation 600-9, *Army Weight Control Program* (1992) at 4. News reports on Nancy Mellette, a woman who intends to apply for

• to provide women with a military clothing allowance that is larger than that provided to men;[17]

•to permit women to have long hair while men must have short hair or shave their heads;[18]

admission to The Citadel, record this colloquy between Mellette and a reporter: "Asked her weight, Mellette pluckily replied, *'Don't you know you're not supposed to ask women that question, sir?'*" Mellette Ready For Citadel, Associated Press (Sept. 6, 1995) (emphasis added).

[17] *See, e.g.*, Neff Hudson, Uniforms Cost More, But Allowances Rise, Air Force Times (Sept. 18, 1995) ("[the clothing] allowances vary for men and women because they have different clothing. Generally, women's uniforms are more expensive, so their allowances are bigger. . . . For male Air Force members, the initial clothing allowance will be $829.61 . . .. Female Air Force members will get an initial allowance of $1,017.93 . . . The Army's initial allowance for male enlisted members will be $958 in fiscal 1996 . . . for female soldiers, the initial allowance will be $1,171.16 . . . Again, enhanced [Battle Dress Uniforms] are the biggest change to the [clothing] list, although women also will get an improved neck tab that costs $4.25 more. Male Marines will get an initial allowance of $923.30 . . . Female Marines will get an initial allowance of $1,147.07").

[18] Army Regulation 670-1, *Wear and Appearance of Army Uniforms* (1992) at 12 (grooming policies for men and women). The role of cultural factors in different standards of appearance for men and women is amenable to intermediate but not strict scrutiny, as seen in recent events surrounding Shannon Faulkner's admission to The Citadel.

Upon obtaining court-ordered admission to The Citadel, Ms. Faulkner sought exemption from The Citadel's traditional "knob" haircut. "Buzz cut" next for Citadel's 1st woman, Detroit News (Aug. 11, 1994)("U.S. District Judge C. Weston Houck . . . said there was no reason to spare [Ms. Faulkner's] hair. 'In making this request for a different haircut, *the plaintiff is asking for unequal treatment.*' The school argued against any such special consideration. 'If the haircut is the first thing, what will be the next?' Citadel lawyer Dawes Cooke asked. 'What is the next thing Ms. Faulkner will find at The Citadel which is not appropriately feminine?'") (emphasis added).

• to allow women to wear earrings and make-up in uniform while men may not;[19]

Indeed, in his Memorandum dated January 13, 1994, then-Secretary of Defense Les Aspin directed the military services to "expand opportunities for women" with the "following restrictions on [their] assignment: where the Service Secretary attests that the costs of appropriate berthing and privacy arrangements are prohibitive * * * [and] where job related physical requirements would necessarily exclude the vast majority of women Service members."[20]

The Department of Justice asked the district court to reconsider allowing The Citadel to shave Ms. Faulkner's head, claiming the school was proceeding "under *the guise of gender-neutral grooming policies* [that] implement rules which altogether denigrate Ms. Faulkner's *identity as a woman.*" The Citadel responded that "[t]he Justice Department motion 'points up some of the paradoxes at work here. On the one hand they espouse the position there are no significant cultural differences between men and women that would justify separate treatment. But now that she's admitted, they say there are cultural differences which mandate separate treatment.'" Justice Department hopes second cut saves cadet's hair, Washington Times (Aug. 6, 1994) (emphasis added). *Cf. Kelly v. Johnson*, 425 U.S. 238 (1976) (upholding grooming standards for police departments); *Campbell v. Beaughler*, 519 F.2d 1307 (9th Cir. 1975), *United States v. Young*, 1 M.J. 433 (CMA 1976) (rejecting male servicemembers' claim that it violated the Constitution to require them, but not female servicemembers, to have short hair).

[19] *Army Regulation 670-1* at 12 (cosmetics and jewelry) and 18 (handbags and purses authorized only for female soldiers).

[20] The Naval Reserve Association's *EXCOM BULLETIN*, December 1994, reported: "Ship modifications costs for the Women at Sea Program are estimated to be $200 million or more. The estimated cost to modify the carrier Nimitz alone is $2.6 million. The newer carriers . . . that have not previously had . . . berthing modifications could cost as much as $6 million each. The carrier Lincoln cost $1.9 million in 1994."

Memorandum from the Secretary of Defense, Subject: Direct Ground Combat Definition and Assignment Rule (Jan. 13, 1994).

The point is clear: for purposes of determining the judicial necessity for strict scrutiny in regard to sex-based classifications, *either the law brooks no differential treatment between men and women or it brooks some.* If it brooks some—and even the Government concedes, and urges on this Court, that it does---then intermediate scrutiny for sex-based classifications remains not only appropriate wholly, but necessary absolutely.

Indeed, it is apparent the Government seeks only the intellectual solace of claiming strict scrutiny for sex-based classifications. Demonstrably, the result it urges, *in fact*, is no more and no less than the result under the intermediate standard of review which, even under the Government's theory, provides a consistent, coherent analytical framework in which to resolve *both* the issue of whether women must be admitted to VMI and the inherent issue of whether it is permissible to accommodate them if they are admitted. Another approach, which is neither consistent nor coherent, cannot be commended to the law.

B. The relationship between the principle of strict scrutiny and the principle of deference to military personnel decisions.

In frank terms, the Government's attempt, in a footnote, to preserve the military's prerogative to make the common sense distinctions now permitted, without fanfare, under intermediate scrutiny is a dodge in the first degree. As a matter of principle and philosophy, the searching judicial inquiry required by strict scrutiny *cannot* avoid diminishing

the scope of judicial deference to military policy choices traditionally required under the law. Rather, strict scrutiny of sex-based classifications would reduce that judicial deference to a very thin reed indeed. And it would be this thin reed upon which would rest "our entire constitutional system." *Gilligan,* 413 U.S. at 10.

The plain fact of the matter is strict scrutiny for classifications based on sex would require a compelling governmental reason *each time* men and women are treated differently. Since, particularly in the military, such policy choices range from the sublime to the minute, courts quickly would find themselves drawn in to the very task this Court admonished the Judiciary not to do. As the Court pointed out succinctly in *Orloff v. Willoughby,* "judges are not given the task of running the army."[21] *Orloff v. Willoughby,* 345 U.S. 83, 93 (1953).

While practical reasons for judicial deference to military policy-making often are advanced and relied upon, the principle of deference is more, and more important, than a recognition of the practical reality that "it is difficult to conceive of an area of governmental activity in which the

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[21] The question before the Court in this case is whether, through the imposition of strict scrutiny, the Constitution *requires* the Judicial Branch to demand the armed forces provide a compelling reason---moreover, as the Government advocates, Br. for Pet. at 44, a compelling reason narrowly tailored to each individual woman---for its policy choices. Manifestly, since "strict scrutiny" means what the Government says it does, that the military must prove a compelling reason why a particular woman was not enlisted as a Multiple Launch Rocket System/Lance Operations/Fire Direction Specialist, manifestly, upon imposition of strict scrutiny, "judges [would be] running the army." *Orloff,* 345 U.S. at 93; *cf.* note 9, and accompanying text, with notes 10-20, and accompanying text, *supra*.

courts have less competence" than military affairs. *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981). Rather, deference is required by the Constitution itself.[22] *Id.* at 67. Indeed, deference is a critical component of the Constitution's separation of powers among the coordinate branches of government. As the Court strongly has counseled, *because* the military is under the exclusive constitutional control of the Legislative Branch, deference to military judgment "*underlies*

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[22] The Founding Fathers' decision to commit the armed forces, through their elected representatives, to the control of the people concurs with the theories of Clausewitz in his military classic, *On War*. Whether the question is battle plans or personnel policies, Clausewitz observed that "the task for the military theorist . . . is to develop a theory that maintains a balance among the trinity of war---the *people*, the *government*, and the *[military]*. A theory that ignores any one of them or seeks to fix an arbitrary relationship between them would conflict with reality to such an extent that for this reason alone it would be totally useless." Summers, *On Strategy: A Critical Analysis of the Viet Nam War* (1984) at 36-37.

Thus, in striking that trinitarian balance, force composition and deployment decisions must factor in physical and other practical requirements, as well as recruiting and retention factors, especially in regard to an all-volunteer force, political factors, and even make "rough accommodations" regarding the remarkable dynamics of sexuality and human nature.

These realities are not blithely glossed over. *See, e.g., Commission* at Finding 4.22 (*re:* Moskos Survey, Table 7 (33% of female servicemembers surveyed said they "definitely would leave" the armed forces if women were compelled to serve in direct combat; another 19% said they "probably would leave" and 7% were "not sure" how such a change would impact their desire to remain in service; only 14% said they "definitely" would remain in service)); *Pregnancy, romance problems for carriers,* Florida Times-Union (March 19, 1995) ("Last year the *Eisenhower* became the Navy's first carrier with women as permanent crew members; 415 now serve among the [4,967-member crew]". . . . 38 *Ike* sailors became pregnant since the crew first went aboard nine months ago; 14 pregnancies occurred in the first six months at sea).

our entire constitutional system."[23] *Gilligan,* 413 U.S. at 10.

The predicate for the rational basis test---the practical reality that makes this deferential standard appropriate and workable---is the fact, to use equal protection terminology, that in the vast majority of policy choices there is no reason to "suspect" the choice was illicit. Indeed, this Court has held that a general rule that took a less flexible approach to determining statutory validity would vitiate "the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their view of what constitutes wise . . . social policy." *Dallas v. Stanglin,* 490 U.S. 19, 27 (1989).

Strict scrutiny, manifestly, is the diametric opposite of rational basis review. Only the most compelling reasons, narrowly tailored, are sufficient to support the legislative choice. As a practical matter, the imposition of strict scrutiny reflects a policy judgment that the reasons for the legislative classification *rarely* will be sufficient. In other words, the imposition of strict scrutiny for sex-based classifications *presupposes* that such classifications "*seldom* [are] relevant to the achievement of any legitimate state interest." *Cleburne,* 473 U.S. at 440 (emphasis added).

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[23] The constitutional scheme which placed the raising and regulation of the armed forces under the exclusive control of the Legislative Branch was no accident. As one military analyst has noted, "*The Federalist Papers* clearly show . . . the Founding Fathers deliberately rejected the idea of an 18th century-type Army answerable only to the Executive. They wrote into the Constitution specific safeguards to ensure the people's control of the military." Summers, *supra* note 22 at 37. This constitutional commitment of the armed forces to the people's control is vouchsafed by the important principle of judicial deference.

Intermediate scrutiny, which this Court has accorded to sex,[24] reflects the practical reality, based on cognizable differences between men and women, that ordinarily those differences between men and women may be reflected in policy choices, but that there exists a somewhat greater-than-usual potential that sex-based distinctions may not be rational.

In other words, intermediate scrutiny strikes a judicious balance between the role of the courts in administering constitutional parameters and the need to give policy-makers appropriate leeway---in widely-ranging factual settings---to account for the fact of life that men and women have certain differences that must be addressed, and sometimes protected, separately under the law. Thus, while intermediate scrutiny recognizes that *sometimes it is rational* to make policy distinctions based on sex, strict scrutiny, at least if applied coherently, *must state that such distinctions seldom (indeed, in point of fact, never) are rational.*[25] *Otherwise---and as demonstrated in the instant case---the expanded role of the judiciary in reviewing those policy choices plainly is unwarranted.*[26]

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[24] Quasi-suspect classification, and hence intermediate scrutiny, also has been accorded to illegitimacy. *Lalli v. Lalli*, 439 U.S. 259, 265 (1978).

[25] In 1976, this Court first announced that laws making distinctions based on sex would be judged by intermediate, or heightened, scrutiny. Such a classification cannot withstand constitutional challenge unless it "is substantially related to the achievement of an important governmental objective." *Craig v. Boren*, 429 U.S. 190, 197 (1976). Since *Craig*, this Court consistently has used the intermediate standard of review for sex-based classifications, applying it or explaining it in at least 17 different decisions in the past 20 years. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. ___ (1994); *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 459 (1988); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-724, & n.9 (1982); *Plyer v. Doe*, 457 U.S. 202, 217 n.16 (1982); *Mills v. Habluetzel*, 456 U.S. 91, 101, & n.8 (91982); *Rostker v. Goldberg*, 453 U.S. 57, 87

II. The impact of strict scrutiny on presently settled questions of federal law counsels strongly against eliminating the well-established standard of intermediate scrutiny.

As demonstrated above, the enormity of the question the Government puts to the Court is too great to be disposed of in a footnote hailing judicial deference to considered military judgment. Moreover, the enormity of the question is too great to be addressed without considering its judicial and public policy consequences well beyond the impact of strict scrutiny for sex-based classifications on the armed forces.

By asking this Court to declare sex is a suspect classification, it is not too strong to state that the Government urges the addition of an Equal Rights Amendment to the Constitution by judicial fiat. The need for an Equal Rights Amendment, however, has been asked and answered, in the forum for such questions designated by the Constitution, and

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(1981); *Kirchberg v. Feenstra*, 450 U.S. 455, 459 (1981); *Wengler v. Druggists Mutual Ins. Co.*, 466 U.S. 142, 150 (1980); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 286 (1979); *Davis v. Passman*, 442 U.S. 228, 234 (1979); *Califano v. Westcott*, 443 U.S. 76, 85 (1979); *Caban v. Mohammed*, 441 U.S. 380, 388 (1979); *Orr v. Orr*, 440 U.S. 268, 279 (1979); *Califano v. Webster*, 430 U.S. 313, 316-317 (1977); and, *Califano v. Goldfarb*, 430 U.S. 199, 210-211 (1977).

[26] To highlight the different (and, heretofore, legally cognizable) considerations that underlie classifications based on sex, one need only substitute a racial minority for women in existing policy choices. *See, e.g.*, policy choices set out at notes 8, 10-21 and accompanying text.

the nation's answer, at least for now, was "no." The nation debated that issue during the 1970's and early 1980's, and decided not to ratify the proposed Equal Rights Amendment (ERA) to the Constitution.[27]

During that time, many states adopted state constitutional versions of the ERA proposed for the federal constitution. The experiences of the 17 state ERAs give some indication of what might happen if this Court declared sex a suspect class.[28]

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[27] Congress proposed the ERA to the states on March 22, 1972. State legislatures quickly ratified the amendment, but the ratification effort soon ground to a halt. By the end of February 1974, 33 of the necessary 38 states had ratified the ERA. Only one state ratified the ERA in 1975, none did in 1976, and the last state to ratify the ERA, Indiana, did so in January 1977. Congress extended the ERA's deadline for ratification from March 22, 1979 until June 30, 1982. No states ratified the ERA during that time. During the original seven year deadline, five states that had ratified the ERA rescinded their ratifications (Idaho, Kentucky, Nebraska, South Dakota and Tennessee). The states of Idaho and Arizona filed suit in federal court in Idaho, seeking a declaration that states had the power to rescind their ratification of proposed amendments, and that Congress lacked the authority to extend the ratification deadline. The federal district court ruled the rescissions were valid and that Congress had no power to extend the deadline. *Idaho v. Freeman,* 529 F.Supp. 1107 (D.Idaho 1981). This Court dismissed the appeal as moot. *NOW v. Idaho,* 459 U.S. 809 (1982).

[28] The seventeen states with ERAs in their state constitutions are Alaska, Art. I, §3 (1972); Colorado, Art. 2, §29 (1972); Connecticut (Art. I, §20 (1974); Hawaii, Art. I, §3 (1972); Illinois, Art. I, §18 (1971); Louisiana, Art. I, §3 (1974); Maryland, Art. 46 (1972); Massachusetts, Part I, Art. 1 (1976); Montana, Art. 2, §4 (1973); New Hampshire, Part I, Art. 2 (1975); New Mexico, Art. II, §18 (1973); Pennsylvania, Art. I, §28 (1971); Texas, Art. I, §3a (1972); Utah, Art. 4, §1 (1896); Virginia, Art. I, §11 (1971); Washington, Art. 31, §1 (1972) and Wyoming, Art. 1, §3 (1896). No state has added an ERA to its state constitution since 1976.

Family Law

Family law has been the greatest area of litigation under the state ERAs.[29] Ironically, the typical ERA family law case consisted of a man challenging a law that made a sex-based obligation on men to provide for women (e.g., fathers must support their families, divorced fathers must pay child support or alimony to their families, etc.).[30] The American Law Reports commented on this phenomenon, saying:

> In application, however, men often seem to have benefited more than women from the state ERA provisions, especially as concerns family matters. This has resulted in women losing some of the special protections they previously enjoyed.[31]

For example, a Maryland law that made it a crime for a husband not to support his wife was declared unconstitutional under the state ERA. The court ruled that such sex-based legal distinctions were now prohibited.[32] Child support becomes a joint responsibility of both parents, not just the

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[29] *See* 90 A.L.R.3d 158, "*Construction and Application of State Equal Rights Amendments Forbidding the Determination of Rights Based on Sex.*"

[30] *See "Equal Rights Provisions: The Experience Under State Constitutions,"* 65 Calif. L.R. 1086, 1106-7 (1977).

[31] 90 A.L.R.3d at 168.

[32] *Coleman v. Maryland,* 37 Md.App. 322, 377 A.2d 553 (1977).

fathers, under various state ERA cases.[33] The state legislatures have responded by passing new versions of these laws that are sex-neutral.

Employment Discrimination Against Women

State ERAs have not been used much to battle employment discrimination against women because of the state action issue. Because private employers are not part of the government, the state ERA does not affect their employment practices. Generally, women use federal and state civil rights statutes to bring employment discrimination claims, not state ERAs.

The Equal Protection Clause has the same state action requirement. "[T]he guarantees of free speech and equal protection guard only against encroachment by the government and 'erec[t] no shield against merely private conduct." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, ___ U.S. ___, 132 L.Ed.2d 487, 499 (1995), quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). Therefore, if this Court interprets the Equal Protection Clause to protect sex as a suspect class, that decision will only affect employment issues in the context of government employees, not private businesses.[34]

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[33] *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974); *Cooper v. Cooper*, 513 S.W.2d 229 (Tex.Civ.App. 1974) and *Kemp v. Kemp*, 287 Md. 165, 411 A.2d 1028 (1980).

[34] In one of the few employment discrimination cases brought under a state ERA, a Texas court upheld a city ordinance that set up separate jobs named "policeman" and "policewoman," because the duties of the two jobs were different. *Turner v. City of Baytown*, 516 S.W.2d 270 (Tex.Civ.App. 1974).

Girls' Athletics

The state ERA cases concerning high school girls' athletics show the same philosophical dilemmas involved in accommodating women in the armed forces. Does one advocate total integration of boys and girls on athletic teams, to promote full equality? Or does one recognize that girls in general do not have the same physical abilities of boys, so girls and boys should have separate teams, so that girls will not be sitting on the bench while boys play in the first string positions on integrated teams? Also, does the constitutional standard apply differently to contact sports than non-contact sports? Does it promote equality to have a boy wrestling on a mat with a girl?

The state courts have come down on both sides of these questions. The Massachusetts Supreme Judicial Court ruled unconstitutional female-only teams, because the state ERA demands total equality.[35] An Illinois court upheld female-only teams, saying that women needed separate athletic teams in order to have actual equality of athletic opportunity.[36] These matters could become federal constitutional questions if this Court declares sex to be a suspect class.

Homosexual Marriage

The Hawaii Supreme Court used its state ERA to apply strict scrutiny to the state marriage laws, ruling that the state must demonstrate at trial a compelling state interest to justify

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[35] *Attorney General v. Massachusetts Interscholastic Athletic Association*, 393 N.E.2d 284 (Mass. 1979)

[36] *Petrie v. Illinois State High School Association*, 75 Ill.App.3d 980, 394 N.E.2d 855 (1979).

its requirement that only one man and one woman can marry. In *Baehr v. Lewin*, 74 Hawaii 645, 852 P.2d 44 (1993), the Hawaii Supreme Court applied the state ERA, which it said is "substantially identical with the proposed Equal Rights Amendment of the United States Constitution," *Baehr*, 852 P.2d at 65. That court ruled that the Hawaii marriage statute contained a sex-based classification, because a man is legally disabled from marrying another man because of his sex. The Hawaii Supreme Court drew a parallel between sex and race, and pointed to Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967). If the state cannot limit who can get married due to their race, and race is a suspect class, then the state cannot limit who can get married because of their sex, because sex is a suspect class under the state ERA. *Baehr*, 852 P.2d at 61-63. In the eyes of the Hawaii Supreme Court, to prohibit same-sex marriages is the constitutional equivalent of banning interracial marriages.

The Hawaii Supreme Court reviewed a decision by the Washington Court of Appeals rejecting the argument that the Washington state marriage law contained sex classifications that violated the state ERA, preventing two homosexual males from getting married. The two homosexual men had challenged the state marriage law that limited marriage to opposite sex partners and argued that the law violated the state ERA. The Washington Court of Appeals rejected that argument, saying that two men or two women could not meet the basic definition of marriage as one man and one woman. *See Singer v. Hara,* 11 Wash.App. 247, 522 P.2d 1187 (1974). The Hawaii Supreme Court criticized this reasoning as "tortured and conclusory sophistry." *Baehr*, 852 P.2d at 63.

The Hawaii Supreme Court remanded the case for trial to see if the state could demonstrate a compelling state interest

in limiting marriage to opposite-sex partners. The Hawaii Supreme Court said:

> On remand, in accordance with the "strict scrutiny" standard, the burden will rest on [the state] to overcome the presumption that [the Hawaii marriage statute] is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights.

Baehr, 852 P.2d at 68. Commentators have clamored to support the idea that laws limiting marriage to one man and one woman are an unconstitutional sex-based classification, deserving review under strict scrutiny.[37] If this Court declares sex to be a suspect class under the Equal Protection Clause, there could be federal constitutional challenges to the other 49 state laws that limit marriage to one man and one woman.

Abortion and Abortion Funding

This Court could inadvertently reopen the abortion issue by declaring sex to be a suspect class. Although this Court said there is no constitutional right to government funding of abortions in such cases as *Maher v. Roe*, 432 U.S. 464 (1977)

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[37] *See, e.g., "Same-Sex Marriage,"* 10 New York Law School Journal 555 (Spring, 1993); *"The Legality of Homosexual Marriage,"* 82 Yale L.J. 573, 588 (1973); *"The Texas Equal Rights Amendment in the Courts, 1972-77: A Review and Proposed Principles of Interpretation,"* 15 Houston L.R. 537, 628 (1978); *"Marriage Rights: Homosexuals and Transsexuals,"* 8 Akron L.R. 369, 373 (1975); *"Same Sex Marriages and the Constitution,"* 6 U.C.-Davis L.R. 275, 292 (1973) and *"The State Equal Rights Amendments and Their Impact on Domestic Relations Law,"* 11 Family Law Quarterly 101, 115 (1977).

and *Harris v. McRae*, 448 U.S. 297 (1980), this contentious issue might very well return to federal court because litigants in various states have argued that their states' ERAs compel government funding of abortions.

In *Doe v. Maher*, 515 A.2d 134 (Conn.Super. 1986), a Connecticut court ordered state funding of Medicaid abortions because of the state ERA. Because only women can get pregnant and have abortions, the court reasoned, then it violates the state ERA not to fund their abortions:

> Since only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical expenses are paid by the state for both men and women is sex oriented discrimination.

Maher, 515 A.2d at 159. The Connecticut court ruled that the state ERA required the law to be examined by "strict scrutiny." This is the standard the Solicitor General urges this Court to adopt.[38]

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[38] Pennsylvania courts also addressed the issue of whether the state ERA mandates government funding of abortions for poor women. An intermediate appellate judge ruled that the ERA did indeed require state funding of abortions. *Fischer v. Department of Public Welfare*, 482 A.2d 1137 (Pa.Cmwlth. 1984). The full appellate court reversed, *Fischer v. Department of Public Welfare*, 482 A.2d 1148 (Pa.Cmwlth. 1984). The Pennsylvania Supreme Court agreed that the state ERA does not mandate government funding. *Fischer v. Department of Public Welfare*, 509 Pa. 293, 502 A.2d 114 (1984).

Additionally, the Massachusetts Supreme Judicial Court ruled that the state government must pay for abortions for poor women. *Moe v. Secretary of Administration*, 382 Mass. 629, 417 N.E.2d 387 (1981). Although the plaintiffs argued that the state ERA required the state to pay

Commentators have sounded a similar theme by urging this Court to declare sex a suspect class, and then root the right to abortion in the Equal Protection Clause, rather than the right to privacy. For example, one commentator said:

> *Roe v. Wade* and *Doe v. Bolton*, the 1973 abortion decisions, for example, barely mention women's rights. They are not tied to equal protection or equal rights theory.... A broader frame for these decisions might have made it more difficult for the Court to rule, as it did stunningly in June 1977, that neither the Constitution nor federal statute requires Medicaid reimbursement for elective abortions.

Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 14 Women's Rights Law Reporter 361, 362 (Spring/Fall 1992).

Plainly, this Court will be forced to revisit the abortion funding decisions if this Court declares sex to be a suspect class. This Court may also be opening up the entire abortion controversy again and jeopardizing this Court's decision in *Planned Parenthood v. Casey*, ___ U.S. ___, 120 L.Ed.2d 674 (1992). In that case, this Court said state regulations on abortion are unconstitutional only if they impose an "undue burden" on that right. *Casey*, 120 L.Ed.2d at 715. The joint opinion of O'Connor, Kennedy and Souter then upheld many provisions of the law, such as the informed consent provision,

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for abortions, the Massachusetts high court declined to rule on the ERA argument and instead granted relief under another provision of the state constitution. 417 N.E.2d at 397.

the parental consent portion and the 24-hour waiting period for obtaining an abortion. *Casey*, 120 L.Ed.2d at 716-730.

But all of this could be reopened if the Court declares sex to be a suspect class. As Justice Blackmun said in his opinion in *Casey:*

> Our precedents and the joint opinion's principles require us to subject all non-de minimis abortion regulations to strict scrutiny. Under this standard, the Pennsylvania statute's provisions requiring content-based counseling, a 24-hour delay, informed parental consent, and reporting of abortion-related information must be invalidated.

Casey, 120 L.Ed.2d at 747. The only way to avoid reopening the abortion issue is for the Court to refuse to rule that sex is a suspect class.

CONCLUSION

This Court should not depart from the well-established standard of intermediate scrutiny to decide this case for VMI.

Date: December 15, 1995

Respectfully submitted,

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APPENDIX

Appendix

List of Amici Curiae

The Center for Military Readiness (CMR) - The Center for Military Readiness is a 501(c)(3) public policy organization specializing in military personnel issues. CMR supporters in all fifty states and on military bases around the world include approximately equal numbers of active duty and retired military people of all ranks and branches of the service, plus civilians who advocate a strong national defense and sound personnel policies that enhance morale, unit strength and overall readiness.

Family Research Council - Family Research Council is an independent, non-profit advocacy group dedicated to ensuring that the interests of the family are considered and respected in the formation of public policy. In 1995, the Family Research Council organized the Military Readiness Project, to participate in decisions made about the military, because the armed forces play an influential role in our national life. Family Research Council was founded in 1981 and is headquartered in Washington, D.C.

Minnesota Family Council - The Minnesota Family Council is Minnesota's largest nonprofit, nonpartisan, profamily organization. Established in 1983, the Minnesota Family Council addresses a wide array of issues affecting the family though the media, the legislative and legal system and by a statewide newspaper called the Profamily News. The Minnesota Family Council is based in Minneapolis.

Concerned Women for America - Concerned Women for America is national, nonprofit organization representing approximately 600,000 people. The purpose of CWA is to

preserve, protect, and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid and related activities. CWA was founded in 1979 and is headquartered in Washington, D.C.

Madison Project - The Madison Project is a membership organization designed to promote conservative public policy, and the election of social and economic conservatives to public office. The organization is named after James Madison who was not only a great Virginian, but authored the Constitution in the spirit of individual freedom and limited government. The Madison Project will focus on Constitutional liberty, traditional values and economic common sense, and will work to recruit candidates, train grassroots workers, and promote public policy consistent with those views. The Madison Project is based in Purcellville, Virginia.

Eagle Forum - Eagle Forum is a conservative, profamily organization of volunteers engaged in public policy making. We have chapters in all 50 states and are concerned particularly with legislation and policies affecting the family and gender relationships. Eagle Forum is based in Alton, Illinois.

Free Congress Foundation -- Free Congress Foundation is a non-profit foundation that seeks to advance fundamental principles of judicial restraint and the rule of law. Among these is consistent application of traditional rules of constitutional interpretation. The proper role for courts is settlement of legal disputes by faithful application of the law to the facts of particular cases. Only then can social policy develop as it should. Free Congress Foundation is based in Washington, D.C.

Northstar Legal Center -- The Northstar Legal Center is a division of the Minnesota Family Council. Its mission is to promote traditional values and constitutional freedoms in the legal arena. The Northstar Legal Center is based in Minneapolis.

(19)

No. 94-1941

Supreme Court, U.S.
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DEC 15 1995
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

UNITED STATES OF AMERICA,

Petitioner,

V.

COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENTS BY DR. KENNETH E. CLARK, MIRIAM B. CLARK, DR. JAMES E. COLVARD, PROFESSOR SUSAN ESTRICH, SALLY HELGESEN, SARA N. KING AND PROFESSOR DAVID RIESMAN

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M. Elizabeth Tidball, *Baccalaureate Origins of Recent Natural Science Doctorates*, 52 J. Higher Educ. 606 (1986) 11

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No. 94-1941

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

UNITED STATES OF AMERICA,
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INTEREST OF *AMICI CURIAE*

Amici Curiae are scholars and educators who have a professional interest and expertise in women's education and leadership development.[1]

Included among *amici* are members of the External Advisory Council of the Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College. The External Advisory Council recommends instructional content and methods for teaching leadership; suggests resources that can be used for leadership courses, including practica; and advises VWIL on assessment and evaluation approaches and tools. The External Advisory Council challenges VWIL to meet the standards it set, to maintain high academic standards, and to demonstrate the effectiveness of the program through objective criteria.

As educators and as members of the Advisory Council, *amici* believe VWIL enhances educational opportunities for women and provides an innovative and excellent program for personal and academic development. VWIL fully prepares women to forge successful careers in any field they choose, including business, government, academia, the professions, and the military. *Amici* are committed to the advancement of women in every aspect of society. They reject the charge of *amici* for the United States that VWIL embodies stereotypes and that single-gender education stigmatizes the excluded gender.

Amici are appearing in this proceeding on behalf of respondents, by consent of the parties, to urge the constitutionality of public support for excellent, innovative educa-

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[1]Descriptions of the *amici* are set forth in the attached appendix.

tion programs like VWIL and to advocate affirmance of the constitutionality of the single-gender programs of higher education in the Commonwealth of Virginia.

SUMMARY OF ARGUMENT

The Virginia Women's Institute for Leadership presents an extraordinary educational opportunity for women. It combines the proven success of single-gender education for women with a cutting-edge leadership program. Educators with many years of first-hand experience in single-gender education shaped the program and based it solidly on contemporary scholarship in leadership development. VWIL prepares young women to attain and succeed in leadership positions in all aspects of life. The philosophy embodied in the program rejects all "fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. For Women v. Hogan*, 458 U.S. 718, 725 (1982). It assumes that no role is inappropriate for women and embodies no stereotypes in its mission or design; VWIL graduates will have the ambition and the ability to succeed in any future role they may choose.

VWIL is an important advance in women's education. In the professional judgment of *amici*, VWIL has been artfully designed and intelligently implemented. It is achieving its goals. It provides, for those young women who choose it, an extremely beneficial alternative to co-education.

ARGUMENT

A. THE VWIL PROGRAM EMBODIES SUCCESSFUL EDUCATIONAL MODELS, IS COMMITTED TO THE ADVANCEMENT OF WOMEN, AND REJECTS ANY STEREOTYPE REGARDING THE ABILITIES AND ROLES OF WOMEN.

The mission and goals of VWIL replicate those of the successful men's program at the Virginia Military Institute. Both programs emphasize the development of self-discipline and self-confidence, physical fitness, intellectual rigor, and personal integrity. Both prepare students for successful careers in a variety of fields, with the option of a commission in any of the military services. VWIL's mission and goals thus reflect the belief that gender cannot predict ability and will not limit a person's role in society. VWIL rejects the proposition that there is a "difference in the respective spheres and destinies of man and woman." *Bradwell v. State*, 83 U.S. (16 Wall) 130, 141 (1872).

VWIL is a highly challenging program: each component is in itself rigorous, and for students to succeed in all the components requires a highly structured and demanding schedule. Its reliance on community and mutual support reflects current scholarship on leadership development; it also responds to a developmental pattern observed in many young women, in whom self-confidence often drops during adolescence.[2] VWIL offers young women a unique and valuable opportunity rather than a superficial equality.

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[2] *See, e.g.*, Alexander W. Astin, *What Matters in College?* (Jossey-Bass 1993) at 404-405; Lodged Materials at 329-30.

The VWIL methodology employs cutting-edge knowledge about leadership and character development and is enhanced by the single-gender setting. It provides a holistic, residential learning environment that encompasses all aspects of the student's life and personal development: academics, physical training, extracurricular activities, community service, and residence life. It provides a variety of leadership experiences as well as attention to theory. Within the program is embodied the belief that there is no one leadership style that is appropriate for women or for men.[3] Students become adept at a broad range of leadership styles and learn to adapt to different situations.

The four components of the program – the academic, physical, military, and co-curricular – are interrelated.

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[3]The Task Force at Mary Baldwin College that designed VWIL specifically rejected any "male" or "female" model of leadership. The Task Force reviewed the extensive body of research on leadership theory and practice. It concluded as follows:

> Recent research in leadership theory and practice deals in complex ways with the contrast between "hierarchical" and "interactive" leadership. Though historical and empirical evidence tends to identify the former with males and the latter with females, we reject the view that the models can only be gender specific. There are not merely two leadership styles; there are in fact a variety of combinations, and for the effective leader, context determines which is the best model. The successful leader therefore will be one who is able to define the context, gauge the environment of any enterprise, clarify the purpose of any group task, and bring to bear the mode(s) of leadership appropriate to the group and its purpose.

Lodged Materials at 328.

The combination of the components is more significant than any single component.

The academic requirements emphasize mathematics, laboratory sciences, foreign language, computer literacy and leadership. The VWIL curriculum is unique in the number of science and mathematics courses it requires within a liberal arts program, providing all students with important analytical tools and familiarity with the scientific method. It also encourages women to explore and excel in the male-dominated fields of math and science, in contrast to the track record of coeducational institutions in this regard.[4] Like the math and science requirements, the proficiency requirements in foreign language and computer literacy reflect a realistic assessment of skills that have become necessary for leaders in practically every field. The increasing influence of globalization and technology on every aspect of life provide expanding opportunity for leadership for those who are adept at communicating and utilizing a variety of media.[5]

In addition, VWIL students must pass four interdisciplinary leadership courses designed specifically for VWIL: Leadership Communications; History and Theories of Leadership; Ethics, Community and Leadership; and a seminar. These courses provide a theoretical base against which students test their own experiences, inculcate specific skills necessary to the practice of leadership, and foster

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[4]*See, e.g.*, Am. Ass'n of Univ. Women Educ. Found., *How Schools Shortchange Girls* (1992).

[5]The option of earning an engineering degree through Mary Baldwin College's joint program with the University of Virginia will encourage ambitions in engineering that otherwise might not have materialized.

reflection on the ethical dimensions of responsible leadership.

The physical training component of the program incorporates eight semesters of physical and health education, regular physical training, and mandatory fitness as measured by a strength and endurance test. It develops the stamina and discipline necessary for successful careers and leadership in every field. In addition, it helps students learn to manage stress and inculcates a lifelong commitment to fitness and health. Physical preparedness is as important for a business career as for a military career. Another benefit of the intensive physical training is that even in their first semester, students progress relatively quickly and measurably toward specific goals, underscoring the program's emphasis on challenging the students to attain ever higher goals.

Professional military training is provided principally through mandatory ROTC. ROTC is not only a preferred route to a commission and a military career, it also provides leadership experience and understanding of various systems and organizations. Through military training, VWIL students recognize the importance of accepting responsibility and of self-discipline.

The fourth component, the co-curricular program, provides a bonding experience within the context of the cohort of women. It incorporates physically and mentally challenging team-building activities (such as ropes courses) that force the students to take risks, challenge themselves, depend on others, and work together. Other aspects of the co-curriculum, including residence life and student government, provide opportunities to practice leadership as participants in VWIL and as members of the larger college and surrounding community.

Important to all four components of the program are four concepts based on current knowledge of how leadership skills are developed: creating a learning community, accepting challenge, joining theory and practice (praxis), and reflecting on experience. Creating a community is important to provide support for the individual and to enforce standards. Further, leaders build community; they have interpersonal skills and can bring people together to get things done. Leaders accept challenges and take risks; they have the confidence and self-respect to propose ideas and take action before others are willing to do so. Leaders think about what they do; they test theory against experience, and use experience to modify theory. They also react positively to feedback. Leaders are ethical and they know the importance of acting in accordance with their beliefs. Exposure to these concepts is embedded in all aspects of the VWIL program, and students have many opportunities to practice and develop the skills involved.

VWIL is well crafted. Mary Baldwin College is dedicated to making the program work. This commitment and the professional caliber of its administration are important to its success. The program was designed by experts in women's education and is the "product of analysis rather than a stereotyped reaction based on [h]abit." *Metro Broadcasting v. F.C.C.*, 497 U.S. 547, 582-83 (1990) (citation omitted) (discussing intermediate scrutiny standard), *overruled on other grounds, Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2112 (1995). It reflects their "reasoned analysis" that it will succeed, and it is succeeding. Appropriate comparative assessment tools are in place. Ongoing assessment provides feedback to students on their progress, information to Mary Baldwin College about VWIL's success in accomplishing its goals, and data for continuing review by the External Advisory Council. In short, there is already in place the mechanism for "continu-

ing review by qualified professional educators" that was directed by the Court of Appeals. *United States v. Commonwealth of Virginia*, 44 F.3d 1229, 1242 (4th Cir. 1995), *cert. granted*, 116 S. Ct. 281 (1995).

VWIL is dedicated to the education of women for success as leaders in every field imaginable. It is not based on stereotypes but on current scholarship on the best ways to develop leadership skills.[6] The differences in methodology between VWIL and VMI reflect professional judgments with which we agree.

B. THE SIGNIFICANT BENEFITS OF SINGLE-SEX EDUCATION ARE NOT PRECLUDED BY THE UNITED STATES CONSTITUTION

Single-sex education, especially for girls and young women, provides significant advantages.[7] Single-sex classes are now being advocated by some educators as an alternative to the documented shortchanging of females in coeducational settings.[8] To be sure, the problems of coeducational learning environments need to be addressed and fixed. Nonetheless, single-sex education is and will continue to be optimal for some students.

[6]The VWIL Task Force listed some of the contemporary scholarship on leadership theory and development that its members read and discussed in developing VWIL in a document titled "Women and Leadership: A Selected Bibliography." Lodged Materials at 348-355. The Task Force looked well "beyond the surface before making [its] judgments. . . ." *J.E.B. v. Alabama, ex rel. T.B.*, 114 S. Ct. 1419, 1427 n. 11 (1994).

[7]The scholarly literature on the benefits of single-gender education continues to proliferate. *See, e.g.*, Kim & Alvarez, *Women-Only Colleges: Some Unanticipated Consequences*, 66 J. Higher Educ. 641 (Nov./Dec. 1995); U.S. Dep't of Educ., *Single-Sex Schooling: Proponents Speak, A Special Report from the Office of Educational Research and Improvement*, (Debra Hollinger, Rebecca Adamson, Eds.) Vol. II (1992).

The benefits of single-sex education for women are well documented.[9] Graduates of women's colleges do better than graduates of co-educational colleges in terms of test scores, graduate school admissions, number of earned doctorates, salaries and personal satisfaction. One-third of the female board members of Fortune 1000 companies are graduates of women's colleges, even though those colleges contribute less than 4% of total female graduates. Forty-three percent of the math doctorates and 50% of the engineering doctorates earned by female liberal arts college graduates are earned by graduates of women's colleges. Graduates of women's colleges outnumber all other female

[8]Am. Ass'n of Univ. Women Educ. Found., *How Schools Shortchange Girls* (1992); Am. Ass'n of Univ. Women Educ. Found., *Growing Smart: What's Working for Girls in School* (1995).

[9]There "is a body of research carried out since the late 1960's which shows that graduates of women's colleges are more likely to become achievers than are the women graduates of coeducational institutions." Tidball, M. Elizabeth, *Women's Colleges: Exceptional Conditions, Not Exceptional Talent, Produce High Achievers* in *Educating the Majority* (Carol Pearson, Donna Shavlik, and Judith Touchton, Eds., 1989) at 157, 160 (hereinafter *Women's Colleges*). Based on this and other empirical data, Professor Tidball concludes, among other things, that "[w]omen's colleges have an unparalleled record of graduating women who attain a variety of measurable post-college accomplishments;" that "the environment of women's colleges is more enabling of women than is that of coeducational institutions;" and that "women in coeducational settings are far less likely to have tested either their interest or their skills in leadership roles." *Id.* at 157, 160-61, 166. In short, women's colleges "represent a strong force for the achievement of women." *Id.* at 157.

entries in *Who's Who*. Graduates of women's colleges are more than twice as likely as graduates of coeducational colleges to receive doctoral degrees, and to enter medical school and receive doctorates in the natural sciences.[10] Almost half of the women college graduates in the workforce hold traditionally male-dominated jobs at the higher end of the pay scale.

Although the research demonstrates that single-sex education works for many women, the reasons for its success need to be more clearly understood. Culture and society, biologically influenced patterns of development and behavior, presence of female role-models, and teaching style have all been cited in various studies. Another factor seems to be simply the absence of the opposite sex, removing sexual tensions and romantic distractions from the educational arena. A recent study by the United States Department of Education urges continuing experimentation and review of single-sex programs in order to enhance our understanding of the reasons for their extraordinary effectiveness. *See Single Sex Schooling: Perspectives From Practice and Research, A Special Report From The Office of Educational Research and Improvement*, U.S. Dep't of Educ. (Debra Hollinger, Ed.) Vol. I (1992); *Single Sex Schooling: Proponents Speak, A Special Report From The Office of Educational Research and Improvement*, U.S. Dep't of Educ. (Debra Hollinger, Rebecca Adamson, Eds.) Vol. II (1992).

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[10]*See, e.g.*, Tidball & Kistiakowsky, *Baccalaureate Origins of American Scientists and Scholars*, 198 Science 645 (1976); Tidball, *Baccalaureate Origins of Entrants into American Medical Schools*, 56 J. Higher Educ. 385 (1985); Tidball, *Baccalaureate Origins of Recent Natural Science Doctorates*, 52 J. Higher Educ. 606 (1986); Tidball, *Women's Colleges* at 160.

Educational theory and practice evolve with study and experimentation. Although coeducation was widely touted both popularly and in academia in the 1960s and 1970s, contemporary scholarship is revisiting the issue and finding value in single-sex education. We believe that the Constitution of the United States is not a hurdle to continuing the expansion of our knowledge of how to provide the best education to girls, boys, young women and young men. Because single-sex education demonstrably responds to educational needs, it is substantially related to an important governmental purpose. *Mississippi Univ. for Women*, 458 U.S. at 724.

C. PUBLIC FUNDING IS IMPORTANT TO THE AVAILABILITY OF SINGLE-SEX EDUCATION

Since the benefits of single-sex education are increasingly demonstrable, it would be ironic indeed to limit its availability to that minority of our society who can afford private education. The experience of Mary Baldwin College to date with the VWIL program demonstrates the importance of public funding. A survey of the initial entering class of 42 women disclosed that many could not have attended the program in the absence of the public funding, which reduced the tuition and other expenses of the program.

The importance of public support for single-sex education also is demonstrated by the increasing understanding that single-sex education and development of leadership skills are particularly beneficial to those from lower income families. The experience of the Ronald Coleman Elementary School in Baltimore is an excellent example. An inner city school in a poor neighborhood, it provides single-sex classes in the first through fifth grades for boys and girls.

Teachers report that both girls and boys are improving academically. Furthermore, some educational leaders believe that all-male classes may reduce the disastrous dropout rate of inner-city youth.

To invoke the Equal Protection Clause to deny public funding for single-sex education would deprive many young people of a valuable educational opportunity, one that could give them the skills to achieve a truer equality as they take their places as adult citizens in the workplace, in the political sphere, and in the community.

D. SINGLE-SEX EDUCATION AND VWIL ARE IMPORTANT AND SHOULD BE UPHELD BY THIS COURT

For all the reasons stated above, *amici* urge that affirmance of the VWIL remedy is important to the future of education in this country. We believe that the VWIL program will produce ambitious and successful graduates and that this success will nullify any theoretical stigma that others contend results from limiting VMI to men. One principle that appears firmly established in higher education is that a diversity of educational options is important to respond to the interests and needs of students. Education is preparation for equality in life. By limiting opportunities and benefits in the name of equality in theory, we may ultimately deny equality in fact. Because the Commonwealth of Virginia has now undertaken to provide an effective single-sex educational experience to both young women and young men, we urge affirmance of the remedy.

CONCLUSION

For these reasons, *amici* respectfully request that the judgment of the Court of Appeals upholding the constitutionality of VWIL and VMI be affirmed.

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December 15, 1995

APPENDIX

APPENDIX

Dr. Kenneth E. Clark is the Smith Richardson Senior Scientist at the Center for Creative Leadership in Greensboro, North Carolina. He has served as Dean of the College of Arts and Science at the University of Colorado (1961-1963), and at the University of Rochester (1963-1980). He is past president of the American Board in Professional Psychology and the American Psychological Foundation, served on the National Medal of Science Committee and was chairman of the Association for the Advancement of Psychology and the American Conference of Academic Deans. He is President-Elect of the Society for Psychologists in Management. He is also a founding fellow of the American Association for the Advancement of Science, and the American Psychological Association. He has served as a consultant to the White House, the Office of Science and Technology, the Army and the Navy, among other entities. Among his publications, he has co-authored *Measures of Leadership*, *Impact of Leadership*, and *Choosing to Lead*. Dr. Clark also edited for ten years the *Journal of Applied Psychology*.

Miriam B. Clark is the former Associate Dean of the College of Arts and Science at the University of Rochester and an educational consultant. Among her publications, she has co-authored *The Graduate Student as Teacher*, *Leadership Education: A Source Book* (in three editions 1985, 1987, 1990), *Measures of Leadership*, and *Impact of Leadership*. With Dr. Kenneth E. Clark, her latest book is *Choosing to Lead*.

Dr. James E. Colvard currently is a visiting professor of Public Administration at Virginia Polytechnic Institute and State University. He also lectures or has

lectured on executive development at the University of Virginia, Indiana University, George Washington University and Johns Hopkins University and at the Kennedy School of Government at Harvard University. Dr. Colvard has earned the Presidential Rank of Distinguished Executive from Presidents Carter and Reagan. The citation for both awards commended significant accomplishments in the advancement of women and minorities. He has also served as Deputy Chief of the Naval Material Command, and Deputy Director of the United States Office of Personnel Management.

Susan Estrich is Robert Kingsley Professor of Law and Political Science at the University of Southern California. She previously was a professor at Harvard University and was the first woman to manage a presidential campaign. She earned her B.A. from Wellesley College, and her J.D. from Harvard University. She writes frequently about issues involving law and gender.

Sally Helgesen is an author and popular speaker whose expertise centers on the pivotal role of women in the emerging workplace. She addresses how profound changes in technology, demographics and the economy are creating unprecedented opportunities for women's talents and skills in the public arena. She is the author of *The Female Advantage: Women's Ways of Leadership*. Presently, Sally Helgesen is undertaking a major study of the role working women play in transforming the post-Industrial economy. Ms. Helgesen is a board member of Women's Collateral Funding.

Sara N. King is a program director in the Leadership and Creativity Development group at the Center for Creative Leadership in Greensboro, North Carolina. She is

the program manager for the Foundation's Leadership Program and the site manager for The Women's Leadership Program. She also co-edited two Center publications highlighting leadership education programs and courses in higher education settings: *Leadership Education 1987: A Source Book* and *Leadership Education 1992-1993: A Source Book.*

David Riesman is Henry Ford II Professor of Social Sciences, Emeritus, at Harvard University. He is an expert in sociology, with a particular emphasis on culture, personality and character, higher education in the United States and single-sex education. He holds a bachelor's degree from Harvard College, a law degree from Harvard Law School and honorary degrees from more than twenty institutions. After completing a year of postgraduate study, he served as the last law clerk to Justice Louis D. Brandeis of the United States Supreme Court. He taught at Buffalo School of Law, and served as a research fellow at Columbia University of Law in sociology and anthropology. He joined the faculty at the University of Chicago in 1946, and returned to Harvard in 1958. He has focused his research in recent years on the development and present state of American higher education. His many publications include *The Lonely Crowd* (1950); *Constraint and Variety in American Education* (1956); *The Academic Revolution* (with Christopher Jencks 1968); and *On Higher Education: The Academic Enterprise in an Era of Rising Student Consumerism* (with several collaborators 1980). His latest book is *Choosing a College President: Opportunities and Constraints* (1990).

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IN THE

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OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,
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COMMONWEALTH OF VIRGINIA, *et al.*,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA,
Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF WOMEN'S SCHOOLS TOGETHER, INC., BOYS' SCHOOLS: AN INTERNATIONAL COALITION;

(Additional Amici Listed on Inside Front Cover)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1941

UNITED STATES OF AMERICA,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,
Respondents.

No. 94-2107

COMMONWEALTH OF VIRGINIA, *et al.*,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA,
Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE, WITHOUT OBJECTION BY THE PARTIES, PURSUANT TO RULE 29.2

Movants Women's Schools Together, Inc., et al. hereby seek leave of the Court to file their brief, amici curiae, lodged contemporaneously herewith, in accordance with Supreme Court Rule 29.2 for the following reasons:

1. Undersigned counsel was requested by amici to prepare an amicus brief to discuss the particular educational perspective of amici, which is different from that of the parties, and which, we believe, will be extremely useful to the Court in deciding this important case.

2. Counsel for amici was aware that certiorari was granted on October 5 and that briefs supporting cross-petitioners were due on December 15, but was unaware until late in the day on December 15 that the order granting certiorari suspended Rule 29.2 and required briefs actually to be filed and served by 3:00 p.m. on December 15, rather than being mailed on that date.

3. All parties have consented to the filing of this brief, amici curiae. The consent letters were filed with the Court prior to the filing deadline of 3:00 p.m. on Friday, December 15.

4. The brief was mailed by the printer to the Court on December 15, in accordance with Rule 29.2 and was served on counsel for all of the parties by mail on December 15.

5. Immediately upon learning of the shortened time requirements, late in the day on December 15, counsel called the Solicitor General, and the Solicitor General personally indicated that he had no objection to the filing of the brief on Monday, December 18, upon receipt by the Clerk, as if filed under Rule 29.2. Counsel for VMI also has consented to the filing of this brief, amici curiae, on December 18, as if filed under Rule 29.2.

6. In order to minimize any inconvenience to the two parties, a copy of the brief was sent by facsimile to each party at approximately 7:00 p.m. (CST) on Friday, December 15. A copy of the brief was also delivered to the Court at 8:25 p.m. (EST) on Friday, December 15, together with an explanatory letter from counsel.

7. A typewritten version of this motion, with a motion to dispense with the requirement for printing, was delivered to the Court on or about 11:25 a.m. on Monday, December 18, and date-stamped by the Clerk. The motion was delivered to the Court as soon as it arrived by overnight courier from St. Louis. Counsel for both parties were sent a copy of the motion, with first class postage prepaid, on Saturday, December 16, 1995.

8. The preparation of this brief required the expenditure of significant resources, and amici, many of whom are concerned educators who believe strongly in the benefits of single-sex education, should not be prejudiced by counsel's lack of awareness of the inapplicability of Rule 29.2 in this particular case.

Wherefore, amici respectfully pray that the Court grant this motion to file their brief, amici curiae, in accordance with Rule 29.2.

Respectfully submitted,

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(Additional Amici Listed on Inside Front Cover)

IN SUPPORT OF RESPONDENTS, CROSS-PETITIONERS

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Questions Presented

1. Whether a state or political subdivision is ever permitted to offer the benefits of same-gender education to one sex without offering them to the other.

2. Whether a state or political subdivision is permitted to offer different educational methodologies to each sex when providing same-gender education to both sexes.

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INTEREST OF AMICI CURIAE

This brief amici curiae is submitted by a diverse array of individuals concerned about the potential implications of the Court's resolution of this case. While all of the amici do not necessarily endorse the overall educational philosophy at VMI, they share a concern that this Court's decision will have consequences for what they believe is an important pedagogical alternative: single-sex education.

Some of the amici on this brief represent urban school districts which have developed or are considering the development of elementary or secondary same-gender programs. In the exercise of their professional judgment, these educators maintain that same-gender public schools or classes benefit young people, and they are concerned that a decision against VMI in this case will not only set back VMI but will also crush their fledgling programs. In addition, most of these educators teach at-risk, disadvantaged children. They do not want the Constitution interpreted in a way that permits only those who can afford private education to have access to the proven benefits of same-gender education.

Other amici are scholars, both women and men, who have spent years studying the educational system. These experts believe firmly, and with good cause, that single-sex education can help both boys and girls. They are concerned that a decision against VMI in this case could deny the benefits of same-gender education to future generations of young women and young men.

Other amici represent or teach at single-sex private schools. They are apprehensive about the implications of this decision for their schools. Some students at their institutions receive federal funds. Many of the institutions themselves are exempt from federal taxation as nonprofit organizations. Others receive substantial forms of federal or state aid. As the district court stated, "the public-private shibboleth is more apparent than real. It cannot be gainsaid that private colleges receive substantial

infusions of both federal and state money. Thus, the distinction [ ] draw[n] is illusory." Pet'r App. at 71a. These amici worry about the implications of this decision for same-gender private schools.

Descriptions of the amici are set forth in the attached appendix.[1]

STATEMENT OF THE CASE

Virginia offers a wide selection of publicly supported and privately funded colleges and universities. Pet'r App. at 187a. Fourteen of fifteen state-supported, four-year colleges in Virginia are now coeducational, the Virginia Military Institute (VMI) being the only exception. *Id.* at 185a, 187a. The Commonwealth currently has five private all-women's colleges and one private all-men's college. *Id.* at 189a. The hallmarks of Virginia's educational policy are "diversity and autonomy," with the Boards of Visitors of each institution having broad autonomy in the determination of its mission. *Id.* at 187a. The Commonwealth now offers three public programs of higher education targeted specifically at promoting leadership in military and civilian life. *Id.* at 107a, 202a-203a, 214a.

The Virginia Polytechnic Institute (VPI) offers both men and women the opportunity to pursue together this education in the VPI Corp of Cadets. *Id.* at 214a. The VPI method differs significantly from the system used at VMI, using "positive motivation" and recognizing individual differences in a more informal environment. *Id.* at 218a.

VMI offers men the opportunity to pursue together this leadership education through a unique, adversative method found by experts, the district court, and the court of appeals to be suited specifically for a sexually homogeneous environment. *Id.* at 148a, 171a, 173a. The adversative system includes physical

---

[1] The parties' written consents to the filing of this brief have been filed with the Court.

rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values for VMI cadets. *Id.* at 191a-192a.

The Virginia Women's Institute for Leadership (VWIL), in its first year, offers women the opportunity to pursue together a leadership education through an analogy to the holistic VMI program, using a "cooperative method which reinforces self-esteem rather than the leveling process used by VMI." *Id.* at 63a-64a.

This case originated from a complaint filed in 1990 by the United States Department of Justice on behalf of a female high school student seeking admission to VMI. *Id.* at 160a. After a six-day trial, *id.*, the district court found three important governmental interests: (1) the diversity added by a same-gender VMI; (2) the substantial educational benefits flowing to each sex from same-gender education; and (3) the benefits flowing specifically to men from the adversative method:

> "[t]he evidence in the case, which is virtually uncontradicted, supports Virginia's view that substantial educational benefits flow from a single gender environment, be it male or female, that cannot be replicated in a coeducational setting." *Id.* at 176a-177a.

The court then held that Virginia's provision of same-gender education at VMI survived constitutional scrutiny under this Court's decision in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). *Id.* at 177a.

The Fourth Circuit agreed with the district court about the undisputed and unique educational benefits associated with same-gender education, *see id.* at 150a-151a, but disagreed about the Commonwealth's ability, consistent with the Fourteenth Amendment, to provide this benefit only to men. *Id.* at 151a. In the process, however, the court affirmed the district court's *factual* findings that such a single-gender education is educationally justifiable. *Id.* The court also affirmed findings of

fact that "coeducation would destroy aspects of VMI's program which lie near the core of its holistic system ... deny[ing] those women the very opportunity they sought." *Id.* at 6a.

In finding a violation of the Fourteenth Amendment, the appellate court ultimately drew three significant conclusions:

> "(1) single-gender education, and VMI's program in particular, is justified by a legitimate and relevant institutional mission which favors neither sex; (2) the introduction of women at VMI will materially alter the very program in which women seek to partake; and (3) the Commonwealth of Virginia, despite its announced policy of diversity, has failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type of education to men and not to women." *Id.* at 155a.

Instead of mandating that women be admitted to VMI or that public funds be withdrawn from the institution, the Fourth Circuit remanded the case, permitting VMI to explore alternatives and specifically suggesting that VMI "might establish parallel institutions or parallel programs." *Id.* at 156a.

After the Fourth Circuit's decision, the Governor approved the proposed Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College (MBC), a private women's college. *Id.* at 102a, 122a. A task force, comprising faculty, staff and students at MBC, with the input of external education experts, developed an implementation proposal promoting the same goals and values as VMI, but intentionally using a different methodology. *Id.* at 102a-103a. Through a contractual arrangement with the state, *id.* at 104a, VWIL now is a "publicly-supported, single-sex education program with military training for women." *Id.* at 107a.

On remand, the district court was persuaded by the testimony of three experts that VWIL is "a pedagogically sound and justified program." *Id.* at 73a. Specifically relying on this expert testimony, the district court found that "the differences between

VWIL and VMI are justified pedagogically and are *not based on stereotyping*." *Id.* at 76a (emphasis added). Accordingly, the court concluded

> "[that] controlling legal principles in this case do not require the Commonwealth to provide a mirror image VMI for women. Rather, it is sufficient that the Commonwealth provide an all-female program that will achieve substantially similar outcomes in an all-female environment and that there is a legitimate pedagogical basis for the different means employed to achieve the substantially similar ends. VWIL satisfies the Fourth Circuit's requirement that the Commonwealth adopt a parallel program for women which takes into account the differences and needs of each sex." *Id.*

On the second appeal, the Fourth Circuit affirmed the district court, using a "heightened intermediate scrutiny test specially tailored to the circumstances..." *Id.* at 5a. The court observed that "[j]ust as a state's provision of publicly financed education to its citizens is a legitimate and important governmental objective, so too is a state's opting for single-gender education as one particular pedagogical technique among many." *Id.* at 21a. The court then concluded that "the only way to realize the [educational] benefits of homogeneity of gender is to limit admission to one gender." *Id.* at 22a.

Instead of ending the "*Hogan* analysis" with the two steps articulated in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), the Fourth Circuit added a third step, asking whether excluded men and excluded women have reasonable opportunities to obtain benefits substantively comparable to those they are denied. *Id.* at 24a.

After specifically rejecting the government's argument that a comparable opportunity requires an identical program, *id.* at 25a, 27a, the court of appeals held that the programs are substantively comparable in design and approved the remedy conditioned on Virginia's maintaining a high level of commitment to VWIL. *Id.* at 27a-28a. The court of appeals issued a judgment accordingly, remanding the case to the district court with instructions regarding appropriate oversight of the implementation of the VWIL program. *Id.* at 30a.

SUMMARY OF ARGUMENT

Under the test in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982), a gender-based classification must serve important governmental objectives, and the discriminatory means employed must be substantially related to the achievement of those objectives.

Virginia has both a broad and a narrow important objective in employing the means of same-gender education. The first objective is the obvious responsibility of every state government to provide a superior education to all of its students. The second, narrower objective, which is related to the first, is to provide the discrete benefits of higher academic achievement, greater self esteem, and greater career advancement that have been proven to result from single-sex education.

If the objectives are sufficiently important, *Hogan* requires that the gender-based classification be substantially related to the achievement of those objectives. 458 U.S. at 724. Thus, a state or a school board must not use gender reflexively as an overbroad proxy for more relevant criteria. The creation of same-gender schools or classes is not an overbroad proxy. In fact, the educational benefit of same-gender education for *some* young people is beyond dispute. The evidence is strong and growing that same-gender education both improves the educational achievement of some young people and achieves the important goals of increased self-esteem, increased academic focus and *less* gender stereotyping.

Unquestionably, single-sex schools and classes substantially serve the important governmental interest of providing a superior education to some students. The issue in this case then

becomes: What constraints does the Constitution place on an educational authority's use of this important educational tool? Specifically, (1) is an educational authority ever permitted to offer the benefits of same-gender education to one sex without offering them to the other? And (2) is an educational authority permitted to offer different educational methodologies to each sex when providing single-sex education to both sexes?

Amici are concerned about the legal standard announced by the Fourth Circuit in this case. In order to provide guidance to lower courts, and more importantly to educators, this Court should lay to rest the notion that a state or school district is always required by the Constitution to provide parallel programs in order to initiate same-gender educational experimentation. A requirement of parallel programs in every instance will chill the revived interest in this important educational method.

In the case of urban school districts, which have the legitimate and substantial goal of providing a quality education to all their students, single-sex education can be warranted to ensure increased achievement for a subset of the overall student population for whom the current range of classroom settings is inadequate. In the best judgment of educators, the particular educational needs of some boys in certain urban areas, and some girls in others, cry out for alternative single-sex educational settings.

State governments and school districts operate under finite budgets to provide the range of educational programs that will best meet the educational needs of the total student population. School districts should not always be constitutionally required to offer parallel programs in each instance of experimentation with single-sex education. That requirement could force school districts to shift limited funds from other beneficial educational programs to create what may be, in their professional judgment, a much less needed same-sex program. The most likely outcome of a parallelism requirement for these school districts struggling to use their limited resources in the most effective manner

possible would be to abandon single-sex experimentation altogether — a tragic outcome, as this method is gaining in popularity and beginning to produce positive results for many children in our inner cities.

Certainly, when a state or school district offers the benefits of publicly funded same-gender education to both sexes, as Virginia has done in this case, the Constitution does not serve as an educational micromanager, second-guessing the methodologies recommended. In the case at hand, an independent group of experts in women's education recommended a non-adversative system as the most effective methodology to teach leadership and military skills to women. Virginia has provided substantial resources for the project. VMI has pledged both monetary and nonmonetary aid. Thus, the Commonwealth, having studied the issue thoroughly, has provided the resources and the support necessary to offer the significant benefits of single-sex education to both sexes. The Constitution requires no more, and the vast majority of parents and students would be disappointed with any less.

ARGUMENT

I. Publicly-Sponsored Single-Sex Educational Programs Are Constitutionally Permissible If They Are Substantially Related to the Achievement of an Important Governmental Objective.

In *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982), the Court articulated the standard for analyzing the constitutionality of a public university's policy of admitting members of only one gender to a particular educational program. Under this test, a gender-based classification is permissible if (1) "the classification serves 'important governmental objectives'" and (2) "'the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* citing *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980).

A. The Promotion of Academic Achievement Constitutes an Important Governmental Objective.

This Court's Equal Protection jurisprudence requires that those using an explicit gender classification must put forward an "important governmental objective" as justification. *Hogan*, 458 U.S. at 724. The Court repeatedly has found objectives such as administrative ease and convenience insufficient to justify gender-based classifications. *Craig v. Boren*, 429 U.S. 190, 198 (1976), *citing Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (plurality opinion). The Court also has scrutinized carefully the "statutory objective itself" to insure that it does not reflect "archaic and stereotypic notions" or is not designed to "exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap." *Hogan*, 458 U.S. at 725. *See also J.E.B. v. Alabama*, 114 S.Ct. 1419, 1426 (1994).

In contrast, the Court has accepted as important governmental objectives the protection of public health and safety, *Craig v. Boren*, 429 U.S. at 199-200; the raising and supporting of armies, *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981); and the prevention

of illegitimate pregnancies. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 470 (1981) (plurality opinion).

Although the cases do not offer a bright line for drawing distinctions between important and unimportant objectives, they indicate that an objective is important if it is a responsibility traditionally assigned to government and highly valued by citizens. *Cf. Craig v. Boren*, 429 U.S. at 199-200 (public health and safety represents "an important function of state and local governments").

Certainly, increasing academic achievement is more analogous to the interests found important by this Court than to those which have been rejected. "Today, education is perhaps the most important function of state and local governments." *Plyler v. Doe*, 457 U.S. 202, 222 (1982), *citing Brown v. Board of Education*, 347 U.S. 483, 493 (1954). In addition, "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Id.* "The primary aim of any school system must be to furnish an education of as high a quality as is feasible. Measures which would allow innovation in methods and techniques to achieve that goal have a high degree of relevance." *Vorcheimer v. School Dist. of Philadelphia*, 532 F.2d 880, 888 (3d Cir. 1976), *aff'd by equally divided Court*, 430 U.S. 703 (1977).[2]

B. The Use of Same-Gender Education is Substantially Related to Achieving the Important Governmental Objective of Increasing Academic Achievement.

"If the State's objective is legitimate and important, [the Court] next determine[s] whether the requisite direct, substantial

[2] In *Vorcheimer*, the Third Circuit, utilizing emerging heightened scrutiny, permitted Philadelphia to retain an all-male high school and an all-female high school, finding the objective of a quality education sufficiently important. *But see Newburg v. Board of Public Education*, 9 Phila. 556 (C.P. Phila. County 1983), *aff'd*, 478 A.2d 1352 (Pa. Super. Ct. 1984) (state court found inequities between Central High School for boys and Girls High School for girls in violation of federal and state constitutions).

relationship between objective and means is present." *Hogan*, 458 U.S. at 725. "The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Id.* at 725-726.

In explaining how to determine the existence of a substantial relationship between means and ends, the Court in *Hogan* cited a series of cases in which the Court struck down statutes for unthinkingly applying traditional assumptions about the sexes. *Hogan*, 458 U.S. at 726 nn.11, 12. In those cases, state legislatures or the United States Congress reflexively used gender as an overbroad proxy for more relevant criteria. *See Craig v. Boren*, 429 U.S. at 201-02 (gender as a proxy for "drinking and driving"); *Stanton v. Stanton*, 421 U.S. 7, 13 (1975) (gender as a proxy for likelihood of attending college); *Weinberger v. Weisenfeld*, 420 U.S. 636, 643 (1975) (gender as a proxy for wage earning).

Rather than being an overbroad proxy, the gender distinction itself in single-sex education creates the desired unique educational benefits for both sexes. As noted by both courts below, the concrete benefits of same-gender education cannot be achieved for one sex unless the other is not present.[3] For that reason, the district court found and the Fourth Circuit agreed that "it would be impossible for a female to participate in the 'VMI experience' ... her introduction into the process would change it." *See* Pet'r App. at 155a, 175a. The benefits from this experience, like all same-gender experiences, flow from its homogeneity. Once a member of the other sex is introduced into the educational mix,

[3] Of course, because co-education is the norm and same-gender education is optional, no one is forced to receive those benefits.

the class becomes coeducational and loses the distinctive benefits of same-gender education for both sexes.[4]

Both the district court's findings of fact and significant independent research demonstrate the close fit between the objective of higher academic achievement and the means of single-sex education.[5] The district court's findings of fact, upheld by the court of appeals, establish that "a substantial body of 'exceedingly persuasive' evidence supports VMI's contention that some students, both male and female, benefit from attending a single-sex college." *Id.* at 168a. The benefits found by the district court include growth in self-esteem, pursuit of non-traditional careers, and higher starting salaries after graduation. *Id.* at 169a.

Research regarding the benefits of same-gender schools at both the college and secondary school level supports the district court's findings of fact. In November 1995, a new study by Mikyong Kim and Rodolfo Alvarez concluded that "attending women-only colleges advantageously affects students' academic ability."[6] The researchers also believe that students in women-only colleges have better opportunities to be actively involved in

[4] The government argues that excluded women who meet VMI's entrance requirements have a right to experience the "distinctive educational method" used at VMI. Again, the district court correctly found that the remedy would be illusory. "A coeducational VMI would offer neither males nor females the VMI education that now exists. The changes would substantially affect the method now used to educate citizen-soldiers." Pet'r App. at 227a. The district court found that it would be necessary to adapt VMI for privacy, to change certain physical training programs, and most importantly, to create different treatment for different classes, thus destroying the egalitarian ethic. *Id.* at 237a.

[5] The brief of amici curiae filed in support of the government by the American Association of University Professors, *et al.* argues that "the lower courts relied on palpably insufficient evidence to justify continuing sex discrimination." Brief for Amici Curiae, AAUP at 20 (No. 94-1941). The challenged findings of fact not only are not clearly erroneous, they are supported by the vast weight of the testimonial and scholarly evidence.

[6] Mikyong Kim & Rodolfo Alvarez, *Women-Only Colleges: Some Unanticipated Consequences*, 66 Higher Educ. 640, 661 (1995).

student organizations, to exercise leadership, and to improve their social self-confidence.[7]

Cornelius Riordan, who has written a book and conducted numerous studies on the benefits of single-sex schools,[8] supports this notion emphatically:

> "[s]ingle gender schools generally are more effective academically than coeducational schools. This is true at all levels of school, from elementary to higher education. Over the past decade, the data consistently and persistently confirm this hard-to-accept educational fact."[9]

In the same article, Riordan summarized the intense interest of educators, parents and students in same-gender education:

> "Single-gender schools work. They work for girls and boys, women and men, whites and nonwhites. Research has demonstrated that the effects of single gender schools are greatest among students who have been disadvantaged historically — females and racial/ethnic/religious minorities (both males and females)."[10]

At the secondary school level, researchers have found strong evidence that same-gender education enhances academic achievement and promotes greater self-esteem. A 1990 study by Lee and Marks found that both males and females attending single-sex schools were more likely than students in coeducational high

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[7] *Id.*

[8] *See* Cornelius Riordan, *Girls and Boys in School: Together or Separate?* (1990); Cornelius Riordan, *The Case for Single Sex Schools, reprinted in* Office of Educ. Research & Improvement, U.S. Dept. of Educ., *Single Sex Schooling: Proponents Speak* [hereinafter DOE Report] Vol. II, 47 (1992); Cornelius Riordan, *Public and Catholic Schooling: The Effects of Gender Policy*, Am. J. of Educ., Aug. 1985, at 518.

[9] Cornelius Riordan, *Reconsidering Same Gender Schools: The VMI Case and Beyond*, Educ. Wk., February 23, 1994, at 48.

[10] *Id.*

schools to attend selective four-year colleges and were more likely to consider applying to graduate schools.[11] The study also determined that young women in all-girls schools showed higher educational aspirations, more active political involvement, and ultimate satisfaction with academic and social aspects of college environment.[12]

At the same time, recent research has also questioned whether gender equity actually exists in public coeducational schools.[13] Indeed, three researchers have found evidence that "coeducational schools may foster stereotypical sex roles."[14]

Hence, the district court's conclusion that same-gender education provides educational benefits to *some* young people is more than amply supported in the record and by independent research.[15] Moreover, this Court has frequently noted its reluc-

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[11] V.E. Lee and H.M. Marks, *Sustained Effect of the Single-Sex School Experience on Attitudes, Behaviors, and Values in College*, 1990 J. of Educ. Psychol. 82, 578-592, *summarized in* DOE Report Vol. I, 13, 37-38 (1992).

[12] *Id.*

[13] Am. Ass'n of Univ. Women Educ. Found., *How Schools Shortchange Girls* 147 (1992) (girls do not receive equitable teacher attention, equitable attention in course materials or encouragement in math and science).

[14] Mary Moore et al., *Single Sex Schooling and Educational Effectiveness: A Research Overview, reprinted in* DOE Report Vol. I, 11 (1992).

[15] *See* Richard Hawley, *A Case for Boys Schools, reprinted in* DOE Report, Vol II, 11 (boys in boys schools do better than boys in coeducational schools on some measures — never, apparently, worse); Richard Hawley, *A Progressive Case for an Ancient Reform*, 92 Tchrs. College Rec. 433, 440 (1991) (schooling boys within structure designed to realize distinctive developmental features has resulted in high count of most longstanding and most demonstrably effective schools in world); Diane Ravitch, *Things Go Better in Single-Sex Schools*, Wash. Post, August 31, 1995, at A23 (of top 150 schools in Great Britain, only 14 were coeducational); Ann Zanders, *A Presentation of the Arguments For and Against Single-Sex Schooling, reprinted in* DOE Report, Vol. II, 15 (research shows that girls benefit from single-sex schools and shows promise and documented successes for African American children).

tance to disturb findings of fact concurred in by two lower courts. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States v. Doe*, 465 U.S. 605, 614 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

II. A State is Constitutionally Permitted to Provide Same-Gender Education for One Sex Without Providing it for the Other.

The evidence clearly indicates that single-sex education can be substantially related to achieving an important governmental objective. Of course, offering the educational opportunity to both sexes is the ideal in that both sexes benefit from the experience. However, these amici are concerned that transforming this ideal into an inviolable constitutional principle would impose rigidities on educators that would limit their abilities to provide promising alternatives to children in their schools. For many students, single-sex education is beneficial to higher educational achievement, greater self-esteem and enhanced career advancement. The important issue then becomes whether a state or political subdivision is free to use same-gender education to meet the needs of one gender without always offering a parallel program for the other gender. The Fourth Circuit, at the liability phase of this trial, found that Virginia had violated the Constitution by not making the benefits of same-gender education available to both sexes. Whether or not this Court agrees with the court below as to VMI's liability, the Court should clarify that the Constitution does not require this parallelism every time a state or school district determines that providing same-gender education for one sex would serve an important governmental objective.

A school district's ability to experiment constitutionally with single-sex schools or classes for only one sex turns on the Court's interpretation of footnote 17 in *Hogan*. 458 U.S. at 731 n. 17. In that footnote, the Court made clear that the issue is not whether

the benefited class profits from the classification, but whether the state's decision to confer a benefit only upon one class by means of such a classification is substantially related to achieving a legitimate and substantial goal. *Id.* This determination, of course, depends on the facts and circumstances of each case.

A. Local Communities and Educators Must Be Permitted to Prioritize the Use of Scarce Resources in Experimenting with Optional Same-Gender Programs.

Whether it is at the level of higher or elementary education, the practical impact of the Fourth Circuit's decision will be to discourage states and cities from offering the option of a single-sex education to students of one gender unless a "substantively comparable" parallel program is offered to students of the other gender, regardless of the need or resources required for such a program. A rigid requirement of parallelism simply is not useful to the real-life problems faced by school superintendents, administrators and teachers.

In 1991, the City of Detroit attempted to establish three all-male academies.[16] The task force recommending the male academies cited a series of dispiriting statistics to justify its important interest in exploring the possibilities of same-gender education. "Males of White, Hispanic and African American ethnic groups [were] at the greatest risk of dropping out of Detroit public schools."[17] Of the 24,000 males enrolled in the Detroit public high schools, fewer than 30% had cumulative grade point averages above 2.0.[18] Boys were suspended from Detroit public schools at three times the rate of girls.[19] Sixty

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[16] Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 Harv. L. Rev. 1741, 1742 (1992).

[17] Detroit Public Schools, Male Academy Grades K-8: A Demonstration Program for At-Risk Males 15 (December 7, 1990) (working draft).

[18] *Id.*

[19] *Id.* at 16.

percent of the drug offenses in Wayne County were committed by 8th and 9th grade dropouts, and 97% of the offenders were African American males.[20] In sum, urban males suffered "a multitude of educational, social, health, and economic problems ... [M]ales appear[ed] to suffer disproportionate rates of school failure, poverty, violence, delinquency, unemployment, incarceration, illness and death."[21]

The report demonstrated that Detroit had previously responded to the problems of young, urban females. "When it was determined that 40% of the females who drop out of school, do so because of pregnancy, three schools and several programs were established to prevent, as well as address, the problems facing pregnant and parenting teens."[22] The report also showed a disparity in academic performance between boys and girls in the Detroit school system. Girls were suspended less often and did not drop out at the rate of boys. In addition, they outperformed boys on standardized tests.[23]

The Detroit academy demonstration program was designed to offer to boys the educationally sound benefits accompanying attendance at a single-sex school: self esteem, rites of passage, role model interaction and academic improvement.[24] The idea was popular, with 1200 applying for 560 spots.[25] The city had plans to open up similar Female Academies, but resource allocation forced it to prioritize the implementation of the program, believing males to be more at risk.[26]

[20] *Id.*

[21] *Id.* at 3.

[22] *Id.* at 15. *See* Kristin Caplice, *The Case for Single Sex Education*, Harv. J. L. & Pub. Pol'y 227, 276 (1994) [hereinafter *Single Sex Education*] (Detroit has existing single-sex schools, three for pregnant girls and one for boys in danger of expulsion).

[23] Caplice, *Single Sex Education*, at 276.

[24] *Id.* at 275.

[25] *Id.*

[26] *Id.*

Misapplying *Hogan*, a federal district court preliminarily enjoined the academies, finding that "there is no evidence that the educational system is failing urban males because females attend school with males." *Garrett v. Board of Educ.*, 775 F. Supp. 1004, 1008 (E.D. Mich. 1991). But neither *Hogan* nor its progeny required such a showing. The "means-ends" test should not be interpreted to require a strict correlation between a coeducational environment and educational impairment. Instead the burden is a positive one of demonstrating that single-sex schools and programs contribute to higher academic achievement, self-esteem and prospects for attending college.[27] Providing these concrete benefits to urban males is an important governmental interest, and the single-sex admissions standard of a school has been shown in independent research to be related, directly and substantially, to achieving that interest.

To be sure, single-sex academies have different and concrete benefits for girls. But the Detroit School Board, with very limited resources, prioritized its needs. The community, with the input of educational experts, decided first to create schools for pregnant teenagers, then to turn its attention to at-risk males. Of course, if Detroit may not constitutionally provide male academies, then it raises the question whether Detroit was permitted under the Constitution to initiate schools for pregnant mothers, without parallel schools for boys. Amici believe strongly that schools for pregnant mothers are constitutional in that "the gender classification is not invidious, but rather reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Court of Sonoma County*, 450 U.S. at 469 (plurality opinion).

A city's prioritizing decisions are not invidious gender classifications, but rather *realistic* reflections of the fact that males and females are not fungible. *Id.* Just as "a legislature may provide

[27] *See* Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 Harv. L. Rev. 1741, 1750-51 (1992).

for the special problems of women," *id.*, *citing Weinberger v. Weisenfeld*, 420 U.S. 636, 653 (1975), a city should be able to respond to the very real needs of urban males, provided that it has done so in a reasoned way, without relying on "archaic and stereotypic notions," *Hogan*, 458 U.S. at 725, or in a way which "demean[s] the ability or social status of the affected class." *Michael M. v. Superior Court*, 450 U.S. at 469, *citing Parham v. Hughes*, 441 U.S. 347, 354 (1979) (plurality opinion). If the Fourth Circuit's emphasis on "parallelism" is interpreted to require that every time a school district initiates an educational experiment designed to address real problems with one gender it must simultaneously initiate a "substantively comparable" educational experiment with the other gender, the courts will have placed an inadvisable straitjacket on school districts and parents in the use of single-sex schooling:

> "[C]ities [should not be] categorically prevented from doing what they c[an] to address the particular needs of specific elements of [their] school-age population simply because [they] [cannot] simultaneously offer a solution to every problem facing every group. This is the kind of flexibility that is essential to the education reform that the country desperately needs."[28]

The Constitution does not require absolute and simultaneous parallelism. "The Constitution requires that [government] treat similarly situated persons similarly, not that it engage in gestures of superficial equality." *Rostker v. Goldberg*, 453 U.S. at 79.

The practical effect of the Fourth Circuit's test in a poor city will not be to expand opportunities for girls but instead to quash the experimentation for boys. If Detroit cannot afford to create male academies and female academies concurrently, the lower court's standard effectively requires them to abandon both projects.

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[28] Caplice, *Single Sex Education*, at 276.

B. Local Communities and Educators Must Be Permitted to Make an Honest Assessment of Needs Rather than to Engage in Gestures of Superficial Equality.

In Ventura, California; Manassas, Virginia; Baltimore, Maryland; and Philadelphia, Pennsylvania, among other areas, school districts have offered or proposed to offer classes, programs or entire schools targeted at girls.[29] Ventura was told by the Department of Education to rename classes aimed at females as classes for the "mathematically challenged," presumably to avoid a loss of federal funds or a constitutional challenge.[30] Philadelphia and Baltimore each has an all-girls high school, although each says that boys are free to apply.[31]

According to one strong supporter of single-sex schools, "[c]lasses like those in Ventura County ... survive constitutional challenge by formally opening their doors to men, with a wink and a nod to keep them from coming in."[32] Statutory requirements aside,[33] amici believe that the Constitution does not

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[29] *See* Eric Wee, *A Lesson in Confidence: Va. Middle School Tries All-Girl Classes*, Wash. Post, May 1, 1995, at A1; Catherine Saillant, *Ventura's All-Girl Math Classes Pass Test on Bias; U.S. Civil Rights Authorities Suggest Courses Be Renamed but Find They Do Not Discriminate Against Boys*, L.A. Times, March 8, 1995, at B1; Laura Rehrmann, *Where the Smart Girls are Away from Boys, Western Students Excel*, Balt. Sun, January 27, 1990, at 3B.

[30] Catherine Saillant, *Ventura's All-Girl Math Classes Pass Test on Bias; U.S. Civil Rights Authorities Suggest Courses Be Renamed but Find They Do Not Discriminate Against Boys*, L.A. Times, March 8, 1995, at B1.

[31] Laura Rehrmann, *Where the Smart Girls are Away from Boys, Western Students Excel*, Balt. Sun, January 27, 1990, at 3B.

[32] Susan Estrich, *For Girls' Schools and Women's Colleges; Separate is Better*, N.Y. Times, May 22, 1994, § 6, at 39.

[33] Amici realize that these schools may still encounter opposition from the federal government under two federal statutes, *see* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1994) and the Equal Educational Opportunity Act, 20 U.S.C. §§ 1701-1758 (1994).

require the cities of Baltimore, Philadelphia and Ventura to maintain "gestures of superficial equality," *see Rostker v. Goldberg*, 453 U.S. at 79, by permitting boys to apply to their all-girls math classes and high schools when the boys' presence will change the dynamic believed by educators and researchers to provide the desired benefits for girls.

Ventura launched high school classes aimed at females because studies had shown that girls' grades and interest in math begin to fall off markedly during junior high.[34] The Unified School District conducted a survey to identify barriers that deter female students from taking advanced math classes. The school district then launched an experimental program described as follows: "[o]ur project, E.D.G.E. (Educational Diversity for Gender Equity), addresses negative perceptions through the vehicle of an algebra 2 class exclusively for female students."[35] As has been demonstrated, same-gender classes have been proven extremely effective in addressing this specific need.[36]

Just as Detroit should be free to respond to research regarding urban males, Ventura should be permitted to do so for females.[37]

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[34] Catherine Saillant, *Ventura New Math Class Recruiting Method*, L.A. Times, February 4, 1995, at B2.

[35] Ventura Unified School District, *Educational Diversity for Gender Equity Proposal*, (undated manuscript) at 2 (characterized by Assistant Superintendent Patricia L. Chandler Ed.D., Ventura Unified School District, as a "proposal which describes need, goals, and program design" in letter to Peter Leibold (November 21, 1995)).

[36] *See generally* DOE Report Vols. I and II (1992).

[37] Although amici for petitioner argue that programs on behalf of women should be subject to less scrutiny than those for men, *see* Brief for Amici Curiae, Employment Law Center, et al. at 25-30 (Nos. 94-1941, 94-2107), this view is shortsighted since optional same-gender education has different benefits, and few costs, for each sex. In addition, those favoring "affirmative action" for women alone at the college level must, in making their case, deal with recent statistics regarding the greater percentages of women in higher

(Footnote 37 continued on next page)

Of course, the decision must be reasoned, without employing archaic stereotypes, and must be targeted at obtaining tangible benefits. *See Hogan*, 458 U.S. at 724-25. In addition, the system as a whole must provide diverse opportunities, with programs targeted at producing beneficial outcomes, for the other sex.

Amici do not contend that it would be permissible for a school district to concentrate all of its attention at improving the educational achievement of one gender while systematically ignoring the other. This is not to say, though, that a rigid parallelism is required or that it is always impermissible to improve the achievement of one gender without improving the other, if the opportunity presents itself. In addition, efforts on behalf of each gender should not have to be exactly the same. For instance, if Ventura's educational experts do not believe that an all-male math class would benefit boys but that a coeducational program to stimulate interest in the arts would be more beneficial, the Constitution should not require a "gesture of superficial equality," *see Rostker v. Goldberg*, 453 U.S. at 79, in order to justify an all-female math class.

In sum, this Court should clarify the Fourth Circuit's standard to rid the decision of its foreseeable consequences: a slavish fidelity to parallelism, regardless of the circumstances facing a state or school district.

(Footnote 37 continued)

education in every year since 1978. Anita Blair, *Separate and Equal*, N.Y. Times, November 20, 1995, at A15. Following this Court's decisions in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc v. Peña*, 115 S.Ct. 2097 (1995), "invidious" or "benign" discrimination receives the same level of scrutiny. This does not mean, of course, that increased scrutiny will not permit a court from taking "relevant differences" into account. *Adarand*, 115 S.Ct. at 2113. "[A] gender based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." *Hogan*, 458 U.S. at 728. The burdens accompanying life as an urban male need to be addressed as well.

III. When Offering Single-Sex Education to Both Sexes, Educators Are Constitutionally Permitted to Use Different Educational Methodologies for Each Sex.

In the case at hand, the remedy for the alleged constitutional violation, extending the benefits of publicly-funded same-gender education to women in a manner considered most effective by educational experts, certainly meets the standard enunciated in *Hogan*.[38] As has been shown, the objective of providing women and men with the establishebenefits of single-sex education is a legitimate and important one. The remaining question, then, is whether the means of providing same-gender education, using different educational methodologies for each sex, substantially serves the achievement of that objective.

As stated previously, "[i]f the State's objective is legitimate and important, [the Court] next determine[s] whether the requisite direct, substantial relationship between objective and means is present." *Hogan*, 458 U.S. at 725. "The purpose of requiring that close relationship is to assure that the validity of the classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the sexes." *Id.* at 725-26.

Virginia's remedy of creating a VWIL to complement VMI and VPI substantially serves the important governmental objectives of providing a public education and offering the established

[38] The Fourth Circuit felt compelled to add a third "substantive comparability" prong to the *Hogan* test. Although amici understand the court's goal, this requirement is unnecessary. If the government's objective is to provide the benefits of same-gender education to both sexes, and it does so in a way that reasoned analysis dictates will not succeed for both genders, the second prong in *Hogan* has not been satisfied. The means employed are not substantially related to achieving the Commonwealth's important goals. In the case before the Court, however, Virginia has done everything in its power to see that both programs succeed, including choosing the educational methodologies which experts believe will make for both a successful VMI *and* a successful VWIL.

benefits of increased academic achievement and superior leadership training for both men and women. Respondents have articulated forcefully and at some length the reasoned analysis by the Commonwealth and by VMI's Board of Visitors used in deciding to retain VMI's single-sex policy. Brief for Cross-Petitioners, at 28-32 (No. 94-2107). For present purposes, it is enough to say that VMI, in exercising its delegated authority from the Commonwealth, appointed a Mission Study Committee to consider carefully the "legality and wisdom of VMI's single-sex policy." Pet'r App. at 208a. After extensive study and site visits, the Mission Committee recommended remaining a single-sex institution because attracting women would be difficult and their admission would "alter the mission of VMI." *Id.* at 212a, 214a.

After the decision on liability in this case, the Commonwealth again made a reasoned study of the most effective way to "provide women the access to a single-sex educational program which would prepare them for leadership positions in civilian and military life." *Id.* at 101a. The district court found as a fact that "[t]he methods by which this goal could be achieved were the subject of intensive study and planning by professionals who are leaders in the field of designing and implementing educational programs for women." *Id.* at 63a. Thus, the decisions regarding admissions and teaching methodology were not made reflexively, but with care, in a reasoned, informed manner. *See Hogan*, 458 U.S. at 726 nn. 11, 12.

The Commonwealth and VMI have crafted a meticulous plan to make VWIL a success. Virginia, among other things, will contribute "dollar-for-dollar for VWIL students as it pays for VMI." Pet'r App. at 80a n.18. The VMI Foundation will endow the VWIL program with a contribution of $5.4625 million in addition to its other contributions. *Id.* at 120a. The VMI alumni association will support VWIL graduates with its alumni network. *Id.* at 120a, 121a. Thus, in its remedial plan, the

Commonwealth has used a reasoned approach in making available the distinct benefits of same-gender education for each sex.[39]

As stated earlier, the benefits from the single-sex experience flow from its homogeneity. Thus, underlying the decision to provide same-gender schools is not an overbroad generalization based on sex which is entirely unrelated to any differences between men and women or which demeans the ability or social status of the affected class. *See Michael M. v. Superior Court*, 450 U.S. at 469 (plurality opinion). The Equal Protection Clause does not "'demand that a statute necessarily apply equally to all persons' or require 'things which are different in fact to be treated in law as though they were the same.'" *Id.* This Court has consistently upheld state action where the gender classification is not invidious but rather realistically reflects the fact that boys and girls, men and women, do not always have the same needs and do not always benefit equally from a given approach. *Id.*

In deciding to offer public single-sex education to both women and men, Virginia has a right to depend on the reasoned, respected views of relevant experts in determining the educational methodology which would be most advantageous to fulfill each school's respective mission. As the court of appeals stated, "we should not reject programs that are aimed at achieving

[39] The government argues that the forced coeducation of VMI is required because excluded women must have access to the "intangible qualities" which make for the greatness of the school. Brief for Petitioner, at 25 (No. 94-1941). If taken to its logical conclusion, this argument does nothing less than require the abolition of public single-sex schools or at least those schools deemed to have intangible benefits. There will always be intangible differences in distinct schools. Not borne of malice or invidious discrimination, some schools will have better teachers. Others will have wealthier alumni. These "intangible qualities" are the product of the fact that all schools are unique. If any individual of one sex has a right to obtain admission to another school, limited to the opposite sex, because that school is different, public single-sex schools by definition will be a thing of the past.

similar results, not generally available from other institutions of higher learning, simply because they differ in approach." Pet'r App. at 26a. The Constitution does not require cookie-cutter, single-sex schools, all forced to offer their students the exact same educational methodology for fear of being dragged into court. Such a requirement would go well beyond *Hogan* or anything this Court has even implied.

CONCLUSION

Virginia's remedy in this case fully satisfies the requirements of the Fourteenth Amendment. The result of a holding against VMI would be to threaten every single-sex public school in the country and possibly to endanger numerous single-sex private schools.[40]

Recent experimentation with same-gender classes for both sexes in Baltimore and other cities, which have a track record of

[40] In an amici curiae brief submitted in support of the government, 26 private women's colleges struggle mightily to distinguish themselves from VMI. While citing numerous cases on the "state action" doctrine, the brief contains no persuasive argument to differentiate this Court's decision in *Norwood v. Harrison*, 413 U.S. 455 (1973). In *Norwood*, this Court found that the provision of free textbooks to students attending racially discriminatory schools constituted unconstitutional state action: "A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of *giving significant aid* to institutions that practice racial or *other invidious discrimination*." *Norwood*, 413 U.S. at 467 (emphasis added). The amici women's colleges offer the following less-than-convincing distinction: "th[is] Court's broad reading of the state action in th[is] case has been limited to circumstances in which the challenged action involves invidious racial discrimination." Brief for Amici Curiae, Twenty-six Private Women's Colleges, at 19 n.12 (Nos. 94-1941, 94-2107). If this Court accepts the government's invitation to make gender a suspect class or requires all public schools to be coeducational, we do not feel as confident as those amici that aid given to private, same-gender schools would be insulated from attack.

increasing achievements among disadvantaged children,[41] would be jeopardized. This would be a tragedy for those children — one not required by the Constitution or this Court's precedents. We urge the Court to find Virginia's chosen remedy for the alleged constitutional violation below consistent with the Fourteenth Amendment, and at the very least, to clarify the standard enunciated below regarding the need for a strict parallelism in the offering of same gender opportunities. For the foregoing reasons, the judgment of the Fourth Circuit in No. 94-1941 should be affirmed.

Respectfully submitted.

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[41] *See* Caplice, *Single-Sex Education*, at 277 (reporting the success of same gender classes for both boys and girls in Baltimore, Milwaukee, Washington, D.C., Norfolk, and Dade County); *see also* Letter from Cornelius Riordan to Senator John C. Danforth (June 30, 1994), *reprinted in* Cong. Rec. S10,205 (daily ed. August 1, 1994) (preliminary data on single-sex classrooms in a public elementary school that is 98 percent African- and Hispanic-American showed that students in single-gender classes outperformed co-educational classes in NCE reading and mathematics tests, higher attendance rates, lower suspension rates and higher parental participation rates).

APPENDIX

APPENDIX

Women's Schools Together, Inc.

Women's Schools Together, Inc. is a national coalition of Catholic high schools for young women. The group is committed to ensuring the option of women's single-gender education and to revisioning the education of women for the 21st century. Women's Schools Together includes approximately 150 Catholic women's high schools nationwide.

Boys Schools: An International Coalition

The coalition is an association of educators representing 150 schools dedicated to understanding and promoting the development of school-age boys. In promoting schools and school programs that focus on the distinctive tempo, sequence, and style of boys' learning, the Coalition aims to insure a future in which humane and capable boys will bring their gifts to bear on the creation of a just and livable world.

Robert C. Bobb

Robert C. Bobb is the City Manager of Richmond, Va. He has served previously in that capacity for Kalamazoo, Michigan and Santa Ana, California. Mr. Bobb has served on the Virginia State Crime Commission and presently serves on the Commission on Parole Abolition and Sentencing Reform. Governor L. Douglas Wilder appointed Mr. Bobb to the Board of Visitors of the Virginia Military Institute. He is also a Fellow of the National Academy of Public Administration. Mr. Bobb's interest in this case stems not only from his seat on the Board of Visitors of VMI but also from his deep commitment to improving the lives of urban youth. Mr. Bobb believes that same-sex education can play a valuable role in accomplishing that task.

Thomas H. Butler, Ed.D.

Thomas H. Butler is the President of the Governing Board of Tempe Preparatory Academy (TPA) in Tempe, Arizona. TPA will be a co-ed, publicly and privately funded Arizona Charter

school with ultimate enrollment of 216 students in grades seven through twelve. TPA envisions itself as a community of learners, both teachers and students, promoting personal integrity, diligent scholarship, creative imagination, community service, and a life-long quest for learning. It is TPA's belief that the greatest educational achievement in its Charter School can be made if boys and girls are in single-sex classrooms.

Dr. Roy J. Dawson

Dr. Roy J. Dawson Jr. is Superintendent of Schools in Camden City, New Jersey. He also is an adjunct professor at Glassboro State College. He has served in numerous capacities for the City of Camden, including as the Director of its Title I program and as the Acting Assistant Superintendent responsible for Compensatory Education, Migrant Education, Bilingual Education and Staff Development programs in Camden City. At the present time, he is responsible for 34 schools, and 20,000 students in Camden. Camden City presently employs same-gender experimentation in its schools and has a keen interest in the continuation of this experimentation with this valuable pedagogical tool.

Peter M. Flanigan

Peter M. Flanigan is a Director of Dillon, Read & Co., a New York City international investment banking firm. He is the founder and the Chairman of the Finance Committee of the Student/Sponsor Partnership, a Trustee of the Manhattan Institute for Policy Research and the founder of its Center for Educational Innovation. He is a member of the New York City Partnership's Education Committee and is committed to providing the benefits of single-sex education to the youth of New York City.

Dr. Richard Hawley

Dr. Richard Hawley is headmaster of the University School, an all-boys school in Cleveland, Ohio. In 1994, he was elected President of Boys' Schools: An International Coalition. Dr.

Hawley has written extensively on the subject of single-sex education for boys and has taught courses in history, government, economics and philosophy. He has lectured and spoken extensively on child development and education issues.

Frank Hayden

Frank Hayden is former president of the Detroit Board of Education and was the chairman of the board committee that recommended the establishment of three all-male academies after studying the academic performance and disciplinary problems of urban male students.

Dr. Spencer Holland

Dr. Spencer Holland is President of Project 2000, Inc., a nonprofit corporation whose primary mission is to provide continuing educational direction, guidance and financial support to inner-city African American males from 7th to 12 grades. He founded the Center for Educating African-American Males and has served in a variety of teaching and administrative positions in urban public school systems. He has worked closely with the Baltimore City Public Schools in implementing same-gender classroom organization in elementary schools and with the Camden public schools at the middle school level.

Nancy E. Kussrow

Ms. Nancy E. Kussrow is the Executive Director of the National Association of Principals of Schools for Girls. The Association exists to serve the cause of education for women and girls. Organized in 1920 and operated exclusively for charitable and educational purposes, the NAPSG is an association of approximately 550 members: heads and other administrators of independent schools enrolling girls, and executives of colleges representing wide geographical diversity. Ms. Kussrow has been the Executive Director of the NAPSG since 1981 and before that served as a principal and teacher in Kentucky and Michigan.

Professor Mary R. Lefkowitz

Professor Mary R. Lefkowitz is the Andrew W. Mellon Professor in the Humanities at Wellesley College. She is the author of many books on the ancient world, including *Lives of the Greek Poets* and *Women in Greek Myth*, as well as articles for *The Wall Street Journal* and *The New Republic*. She is the co-editor of *Women's Life in Greece and Rome* and of the forthcoming *Black Athena Revisited*. She teaches at one of the most prestigious all-women's colleges in America and has a significant interest in the success of same-sex schools.

Kathleen S. McCreary

Kathleen S. McCreary is a senior tax attorney at the Metlife Insurance Company. She serves on the Boards of Directors of the Catholic League for Religious and Civil Rights and the Center for Law and Religious Freedom. She is a graduate of Wellesley College and a strong advocate of the benefits of same-gender education.

Joan S. McMenamin

Ms. Joan S. McMenamin is the Headmistress Emerita of the Nightingale-Bamford School. She is on the Board of Trustees of the Lawrenceville School and a member of the Headmasters Association and the Headmistresses Association of the East. She previously served as President of the New York State Association of Independent Schools, the National Association of Principals of Schools for Girls and the Headmistresses Association of the East.

Joseph W. McPherson

Joseph W. McPherson has been headmaster of The Heights School since 1984. The Heights is an independent college preparatory day school for boys in grades three through twelve. The school was founded in 1959.

Dr. Angela Pienkos

Dr. Angela Pienkos is chief administrator of Divine Savior Holy Angeles High School. She has served in that capacity for twenty years. The Catholic all-girls high schools has an enrollment of 570, and this institution as well as its chief administrator have a keen interest in continuing to provide the benefits of a single-sex institution to young women..

Dr. Diane Ravitch

Dr. Diane Ravitch is a Senior Research Scholar at New York University. She served as an Assistant Secretary of Education for the Office of Educational Research and Improvement under President George Bush. While at the Department, she commissioned an impartial review of research on single-gender schooling. She has written on the subject and believes that same-gender opportunities should be available for both young women and young men. She has a deep interest in the educational achievement of young Americans in the setting most appropriate for each child.

Dr. Cornelius Riordan

Dr. Cornelius Riordan is Professor of Sociology at Providence College. He received an M.A. in Sociology from Clark University, his doctorate in Sociology from Syracuse University, and he completed two years of postdoctoral work in educational research at Johns Hopkins University. His area of specialization is the social organization of schools and the educational outcomes that are related to school organization. He has studied the affects of single-gender education at all levels of schooling for the past decade. He is the author of *Girls and Boys in School: Together or Separate?* and numerous professional articles on this topic.

Dr. Joseph P. Spirito

Dr. Joseph P. Spirito is the Superintendent of Schools for the Ventura Unified Schools District in Ventura, California. He

oversees a budget of $65 billion budget, 16,300 students, and 1,200 employees. Ventura has initiated the "Educational Diversity for Gender Equity" proposal. The proposal was designed to address the underrepresentation of women in careers that require a math and/or science background. Because of his involvement in this issue, the superintendent has a keen interest in the constitutional analysis used to evaluate same-gender classes and schools.

Michael M. Uhlmann

Michael M. Uhlmann is a senior fellow in Law and Public Policy at the Ethics and Public Policy Center in Washington, D.C., concentrating in education policy, among other issues. He has taught law at the George Mason University Law School and served in the United States Department of Justice. He served as a Special Assistant to President Ronald Reagan and has a deep and abiding interest in the continuation of single-sex schools for both young men and young women..

The Honorable Arnold W. Webster, Ph.D.

The Honorable Arnold W. Webster has been the Mayor of the City of Camden since January 1994. He has served in Camden City public education for more than two decades. He served as superintendent of schools from July 1986 until January 1994. He was assistant superintendent for eleven of the twelve years preceding 1986. The Mayor has received numerous awards, including the Youth of Camden's Outstanding Citizen Award.

Supreme Court
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No. 94-1941

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA, *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICI CURIAE* THE STATE OF SOUTH CAROLINA AND THE CITADEL, THE MILITARY COLLEGE OF SOUTH CAROLINA IN SUPPORT OF THE COMMONWEALTH OF VIRGINIA, *ET AL.*

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INTERESTS OF AMICI

The State of South Carolina and The Citadel, The Military College of South Carolina are amici whose interests are uniquely affected by this case. South Carolina and Virginia are the only states that currently offer publicly-supported single-sex undergraduate education to men and women. Like VMI, The Citadel is an all-male military college whose admissions policy has been challenged. In response to the Fourth Circuit's decisions in the present case and in its South Carolina counterpart, both South Carolina and Virginia have begun operating all-female leadership programs at the collegiate level.[1]

STATEMENT[2]

South Carolina's litigation began several years after the 1990 challenge made by the United States to VMI's single-sex admissions policy. Unlike the VMI litigation, the challenge to The Citadel's single-sex admissions policy was initiated by an individual plaintiff, Shannon Faulkner. The United States intervened shortly after Faulkner filed her complaint.

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[1] Reported decisions in the South Carolina litigation are as follows: *Faulkner v. Jones*, 858 F.Supp. 552 (D.S.C. 1994), *modified and remanded*, 51 F.3d 440 (4th Cir.), *dismissed as moot*, 116 S.Ct. 331 (1995). *See also, Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993) (affirming preliminary injunction).

[2] The Statement which follows is centered on South Carolina, whose litigation and factual background are both practically identical to Virginia's.

The Fourth Circuit's liability decision in *Faulkner*, 51 F.3d 440 (4th Cir. 1995) (*"Faulkner II"*) was issued several months after its remedy decision in *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995) (*"VMI II"*). The Fourth Circuit in *Faulkner II* rejected an argument based on the absence of demand for an all-female Citadel, which absence the district court had found to be a fact. In *Faulkner II* the Fourth Circuit held that the liability and remedy principles stated in *VMI I* and *VMI II* are applicable to South Carolina. 51 F.3d at 444. In an effort to protect the rights of plaintiff Faulkner, who was by then a rising junior, the Fourth Circuit afforded her the "special, conditional relief" of admission to The Citadel in August 1995 unless South Carolina was able by then to "provide[ ] a parallel program that meets the criteria of *VMI II* and is approved by the [district] court. . . . " 51 F.3d at 450.[3] With regard to women other than Faulkner (there were no other female applicants to The Citadel in the spring of 1995, and there have been only two so far for the class which begins in August 1996), the Fourth Circuit remanded the case, directing the district court to establish a "timely but practicable schedule for South Carolina to formulate, adopt and implement a plan which conforms with the Equal Protection Clause. . . . " 51 F.3d at 450. In practical effect, the district court and the parties have regarded August 1996 as the date by which South Carolina's parallel program must be in place and approved for women other than Faulkner. On November 30, 1995, the

[3] South Carolina, like Virginia, was also given the option of selecting "some other acceptable option, as discussed in *VMI*. . . . " *Id.*

district court stayed the remedy trial in South Carolina's case pending the result of the *VMI* case in this Court.

South Carolina has historically supported and continues to support single-gender educational institutions as a matter of public policy. As recently as 1970, South Carolina successfully defended the single-gender admissions policy of Winthrop College, then a state-supported college for women, against a claim by men seeking admission to that school. *See Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970) (three-judge court), *aff'd mem.*, 401 U.S. 951 (1971). However, four years later, at the urging of Winthrop's Board of Trustees who cited declining enrollments, South Carolina elected to permit Winthrop to become a coeducational school, which it remains.[4] Thus between 1974 and the early 1990's when the VMI and Citadel litigation began, South Carolina, for the first time since Winthrop became a state school in 1891, was in the position of offering single-sex education to men but not to women. The situation was similar in Virginia, where the last of that state's single-sex colleges for women became coeducational in 1972. *VMI I*, 766 F. Supp. at 1417-1418.[5]

[4] South Carolina Act No. 950 of 1974, § 6, 58 S.C. Stat. 2074, 2076; *see also, Faulkner v. Jones*, 858 F. Supp. 552, 556 (D.S.C. 1994).

[5] In the context of this case, it is easy to lose sight of the states' provision for women in higher education generally. In South Carolina in 1993, for example, there were nearly 10,000 more women than men attending the state's public colleges. *See Faulkner*, 858 F. Supp. 552, 560 (32,642 women and 22,831 men). The same pattern occurred with regard to State support of private colleges, made in the form of tuition grants to students; as a

The challenges to the admissions practices of VMI and The Citadel in the early 1990's made it apparent that a twenty-year practice which had started as an accident of history might present a constitutional dilemma. As a result, the South Carolina General Assembly reexamined its commitment to single-gender education. In a 1993 Concurrent Resolution, the General Assembly reiterated its support of single-gender education, appointing a study committee "to assist the State . . . in carrying out its responsibilities of providing single-gender educational opportunities for women. . . . " *See Faulkner, supra,* 858 F. Supp. at 560. The study committee in 1994 suggested that these responsibilities might be met, *inter alia,* by offering a parallel program through a compact with a private women's college. *Id.*

In 1995, the South Carolina General Assembly codified its public policy concerning single-gender education as follows:

> A. The General Assembly finds that some students, both male and female, benefit from attending a single-gender college. For these students, the opportunity to attend a single-gender college is a valuable experience, likely to lead to better academic and professional achievements. The General Assembly therefore adopts the findings of fact in U.S. v. Commonwealth of Virginia, 44 F.3d 1229, 1232, 1238 (4th Cir. 1995) that "single-gender education at the college level is beneficial to both sexes." Further, in that single-gender education is both beneficial and

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general rule, over 60% of the private college students receiving those State tuition grants are women.

> justifiable, the General Assembly finds that providing opportunities for students to attend a single-gender college fulfills an important and legitimate state objective, and therefore declares and stipulates that it is the public policy of the State to support the establishment and maintenance of single-gender programs of higher learning for both sexes. Single-gender offerings to both men and women need not be identical in form and detail, but should be designed to produce substantively comparable outcomes.
>
> B. The General Assembly shall annually provide such funding as may be necessary, under the auspices of the Commission on Higher Education, to establish and maintain approved single-gender offerings.[6]

After the decisions in *VMI II* and *Faulkner II*, South Carolina entered into an agreement with Converse College, a private college in Spartanburg, South Carolina, for Converse to host the parallel program. Converse College has been an all-female college since its founding in 1889. In two statutes enacted in 1995, the State provided initial funding of a total of $3.4 million ($2 million for capital improvements and $1.4 million for annual operating costs).[7] In addition, The Citadel by contract made an initial payment of $5 million to Converse, to be followed

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[6] South Carolina Act No. 145 of 1995, Part II, §§ 95(A), 95(B), 69 S.C. Stat. 900, 1460-1461. Section 95(C) of Part II of the above act provides that if the Supreme Court reverses the Fourth Circuit's decision in *VMI II*, Section 95 "shall be void and of no effect."

[7] South Carolina Act No. 145 of 1995, 69 S.C. Stat. 900, 995, 1251-52; South Carolina Act No. 146 of 1995, 69 S.C. Stat. 1487, 1491.

by a total of at least $1.6 more if court approval is obtained.

The parallel program created at Converse (The South Carolina Institute of Leadership for Women (SCIL)) was patterned on the VWIL program at Mary Baldwin College. It shares the missions and goals of The Citadel, but uses a non-adversative methodology. The SCIL Program opened in August 1995 with twenty-two initial participants (of whom nineteen are freshmen) who are now near the end of their first semester.

Concluding that discovery could not be completed in time for the merits of the parallel program to be reviewed this past summer, the district court declined to undertake such review prior to the August 1995 date when The Citadel's incoming Corps of Cadets reported. Former plaintiff Faulkner reported to The Citadel as a prospective member of the Corps of Cadets on August 12, 1995. Two days later, she entered the infirmary. After spending five days there, she voluntarily withdrew from The Citadel.

The district court dismissed Faulkner's complaint as moot on October 3, but permitted another individual plaintiff to intervene on the same day. The hearing on the constitutionality of SCIL has been stayed pending this Court's decision in *VMI*. Converse College, however, continues to recruit women to enter SCIL in the fall of 1996.

SUMMARY OF ARGUMENT

The record in this case shows that single-sex education is undeniably beneficial to some students. Likewise, the record shows that women who seek leadership education would not attend an all-female VMI, and no expert for either side suggested that VMI's adversative method was a recommended educational methodology for women.

The courts below correctly concluded that Virginia's single-sex education policies were based on observable facts rather than stereotypes. The court of appeals correctly determined that in the special context of single-gender education, equality of treatment would not result from requiring coeducation or an all-female leadership program which is identical to the one offered to men.

ARGUMENT

The Court of Appeals correctly balanced the need to accord equality to both sexes with the important state interest in single-sex education.

A. Single-gender education serves an important state interest.

The record shows the agreement of both sides' experts that some students, both male and female, benefit from attending a single-sex college. Petitioner's expert Astin concluded that:

> Single-sex colleges show a pattern of effects on both sexes that is almost uniformly positive.

> Students of both sexes become more academically involved, interact with faculty frequently, show large increases in intellectual self-esteem, and are more satisfied with practically all aspects of college experience (the sole exception is social life) compared with their counterparts in coeducational institutions.

VMI I, 976 F.2d 890, 897, *quoting* I JA 1830. After quoting several other studies to the same effect, the Fourth Circuit in *VMI I* observed that "[t]he experts for both sides in this case appear to agree with the conclusions reached in these studies." *Id.*[8] In accord with the views of its experts, petitioner did not appeal the findings of fact concluding that single-gender education was valuable. The findings could not reasonably have been reversed as "clearly erroneous" even had they been appealed.

A 1990 survey of alumni of The Citadel as part of the American College Testing Association's alumni survey reinforces these conclusions that students at single-sex colleges "are more satisfied with practically all aspects of the college experience." Citadel alumni were more than twice as likely as their average counterparts from similarly-sized colleges nationwide to report that the quality of education at their college is better than at other colleges. Among the things they believe The Citadel taught them to do better than alumni of most other colleges were "working independently," "working on [their] own,"

[8] In *VMI II*, the Fourth Circuit noted "that single-gender education at the college level is beneficial to both sexes is *a fact established in this case.*" 44 F.3d at 1238 (citing 766 F. Supp. at 1411-12) (emphasis added). *See also*, 766 F. Supp. at 1434-1435 (Findings of Fact VII.B 7 through VII.B 14).

"following directions," "working cooperatively in groups," "defining and solving problems," "planning and carrying out projects," "persisting at difficult tasks," "leading/guiding others," "organizing [their] time effectively," and "recognizing [their] rights, responsibilities, and privileges as citizens." While most studies of the benefits of single-gender colleges understandably focus on women's colleges, inasmuch as there are only five non-religious single-sex colleges for males, The Citadel alumni survey provides clear and convincing empirical evidence that single-gender colleges benefit men as well as women. South Carolina believes that similar results can be achieved for female graduates of the SCIL program.

B. The remedy in this case was based on valid observations about the psychological and developmental needs of women and men and on expert opinion about the methods of leadership education responsive to those needs.

1. The result in this case will inevitably be based on a generalization.

It is well settled that education, even elementary education, is not an entitlement which the State must offer its citizens. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 35 (1973). However, it is axiomatic that when the state offers a benefit to its citizens, it must make that benefit available to all citizens on an equal basis.

In this case, of course, the difficult question is what constitutes equal treatment of men and women in the context of specialized state-supported higher education

programs. Regardless of how this Court decides this case, the decision will reflect and embody a choice among several conflicting generalizations concerning women, particularly women who are about to enter college. None of these generalizations is universally true, but the need to choose one over the others is inescapable.

Virginia based its single-gender women's leadership program on the finding, supported by unambiguous statistics and a nearly-unanimous body of expert opinion based thereon, that the psychological and developmental needs of most women entering college vary significantly from those of most men. Using this as their basis, the experts designed an all-female leadership training program which was responsive to the demonstrated needs of prospective participants. Virginia, in agreeing to sponsor a single-gender leadership training program for women, accepted the experts' conclusions that a different methodology can and should be used to produce the same outcome as VMI. The desired outcome for both women and men is that the leadership training and experience developed in college will equip them to fill leadership roles in later life.[9]

Petitioner, on the other hand, urges reliance on the false and unsupported generalization that the very small number of women who would choose to attend VMI should be regarded as the paradigm for all women seeking leadership education in college. Petitioner argues that

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[9] The evidence in both cases strongly indicates that if the states had chosen to create all-female military institutions, such institutions would soon have closed because of lack of demand. *VMI*, 852 F.Supp. at 481 n.12; *Faulkner*, 858 F.Supp. at 860.

in the context of higher education, equal treatment means identical treatment: in petitioner's view, all college-age men and women should be regarded as approaching leadership training in higher education from the same standpoint of the few women who desire coeducational adversative leadership training. Any other result, petitioner says, would be based on "harmful sex-role stereotypes" which in turn are founded on "invalid assumptions." Br. of Pet. at 16, 19 (page proof version). Petitioner's view would require Virginia and South Carolina to tailor their state-supported leadership programs accordingly, forcing all women who desire state-supported leadership training to be limited as a practical matter to receiving it in a coeducational setting which uses the adversative method.[10] In other words, petitioner argues that if even one woman wants coeducational leadership training, it does not matter if all other women and men are precluded from receiving the benefits of public single-gender education.[11]

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[10] There are several reasons why the admission of women to VMI would probably have the practical effect of eliminating the option of state-supported single-sex education. In all likelihood, a decision that VMI must be made coeducational would effectively render unconstitutional the continuation of the VWIL program or any other state-supported single-gender program of higher education. As a result, Virginia would have to choose whether to let VMI become a private college or whether to operate only the coeducational VMI. A decision requiring VMI to admit women would therefore greatly diminish, and probably eliminate, the chances of women receiving a state-supported single-sex leadership education.

[11] Tailoring state-supported higher education leadership programs to accommodate every individual's preferences would lead to the absurd result of a state sponsoring at least six

2. Classifications based on reasoned analyses are necessary and constitutional bases for allocating state resources.

This Court has previously held that the Constitution permits generalizations about groups of persons when such policies are "a product of analysis rather than a stereotyped reaction based on habit." *Metro Broadcasting v. F.C.C.*, 497 U.S. 547, 582-83 (1990) (internal quotation marks and citations omitted).[12] (This Court's recent decision in *Aderand Contractors, Inc. v. Pena*, 115 S.Ct. 2097 (1995) does not undermine *Metro Broadcasting*'s analysis about what is permitted under the intermediate scrutiny

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separate programs: two coed programs using the methods of VMI and VWIL, respectively, and four single-sex programs (two male programs using VMI and VWIL methods, and two female programs using VMI and VWIL methods).

[12] *Metro Broadcasting* approved a classification which placed all members of one race into a single group. The dissenting Justices contended that such a classification was improper because "the Government must treat citizens as *individuals*, not as simply components of a racial, religious, sexual or national class." 426 U.S. at 602 (O'Connor, J., dissenting) (emphasis in original) (citations and internal quotation marks omitted). The present case, however, demarks the limit of the extent to which that view may be valid. In *Metro Broadcasting*, no one within the class was directly harmed by attributing a set of characteristics to the class as a whole. Here, however, a result which is based only on recognizing the claims of the few individual women who seek an adversative coeducational state-supported leadership education will practically, if not legally, terminate the rights of a larger group of individuals within the same class, i.e., those women for whom public single-gender education is beneficial. The individual claims of one set of members in the class will in this case inevitably be overridden by the individual rights of another set of members of the same class.

test). As *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) holds, gender-based classifications must be rejected when they embody "fixed notions concerning the roles and abilities of males and females" or "archaic and stereotypic notions." 458 U.S. at 725. Stated differently, such classifications must be rejected if made "unthinkingly" or "reflexively." *Rostker v. Goldberg*, 453 U.S. 57, 72, 74 (1981).

The only generalization in this case which is based on an unreasoned, unverified stereotype is that made by petitioner. It is a relatively new stereotype rather than an "archaic" one, but if is a stereotype nonetheless. Nothing is gained by substituting a new stereotype for an old one when both are equally in error. The few women who seek admission to VMI and The Citadel thus should no more be regarded as the paradigm for all women than should any women who still would prefer not to fulfill some societal roles because of a belief in their "natural and proper delicacy and timidity. . . . " *Bradwell v. State*, 16 Wall. 130, 141 (1872) (concurring opinion).

This Court has rejected gender stereotypes which contain only "a shred of truth," or when there is but "some statistical support can be conjured up for the generalization." *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419, 1427 n.11 (1994). *J.E.B.* did not, however, announce an absolute rule rejecting gender-based differences in treatment in all cases. The Court instead simply held that a "measure of truth" *alone* cannot justify support treating the sexes differently. Moreover, the "shred of truth" in the generalizations rejected in prior cases was, as the term implies, not overwhelmingly representative of the psychological and developmental differences between men

and women, as here.[13] Petitioner, not Virginia, seeks to inflate a mere shred of truth into a general constitutional principle.

In the context of racial classifications, this court has been willing to adopt "a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact." *Brown v. North Carolina*, 479 U.S. 940, 941-42 (1986) (O'Connor, J., concurring in denial of certiorari and referring to *Batson v. Kentucky*, 496 U.S. 79 (1986)). South Carolina submits that accepting petitioner's contentions in the present context will move matters dangerously far away from "a statement of fact," and in so doing will make a most undesirable "statement about what this Nation stands for."

3. There is no reasonable dispute that few women would benefit from a coeducational VMI.

Petitioner's desire to force all women who seek state-supported single-gender education into the mold of the few women who may wish to attend a coed VMI is neither logical nor supported by the evidence. The record clearly establishes that there are significant psychological and developmental differences between men and women as they enter college. Petitioner's own experts have

[13] There was virtually no factual support presented for the generalization about women urged upon the Court in *J.E.B.*, in contrast to the near-unanimity in this record with regard to the real differences in the ways men and women achieve the outcome of being trained to lead in today's society.

observed this indisputable fact, as shown by the following statement by Petitioner's expert Astin, reflecting the compilation of student answers to questionnaires:

> [W]omen enter college already differing considerably from men in self-rated emotional and psychological health, standardized test scores, GPA's, political attitudes, personality characteristics, and career plans. . . .

II DX 104 at 405 (II JA 278; L. 346). Astin further described several of these observed gender differences in persons entering college as follows:

> Some of the largest gender differences occur in the area of psychological well-being. * * * There are also many gender differences in cognitive development.

Id. at 404-405 (II JA 278; L. 346). Other experts called by Petitioner reinforced these observations. *See, e.g.*, I Tr. 377 (I JA 625) ("there clearly are differences between men and women, and not only the obvious physiological ones. . . . ").[14]

The experts who designed the VWIL program concluded that these differences would make any parallel program modelled on VMI unlikely to succeed. The reasons for the likely lack of success, they concluded, were twofold: an all-female program based on VMI would attract little interest,[15] and as a result, it would fail to turn out women leaders in any appreciable quantity even if it

[14] There will probably never be an end to the debate over the causes of these differences, but they clearly are present before women ever get to college.

[15] *VMI II*, 852 F.Supp. at 481 n.12.

could be kept in operation. As the court below summarized the record:

> The possibility of adopting the adversative methodology to women, setting woman against woman with the intended purpose of breaking individual spirit and instilling values, could succeed only if it is true that women, subjected to the same grating of mind and body, respond in the same way men do, and only then if a sufficient number of women necessary to make such a program work desired to participate in the program. Educational experts for the Commonwealth testified that women may not respond similarly and that if the State were to establish a women's VMI-type program, the program would attract an insufficient number of participants to make the program work. The United States did not offer sufficient evidence to lead us to conclude that the Commonwealth's expert testimony was clearly erroneous in this regard.

VMI II, 44 F.3d at 1241.

In contrast to the bleak prospects for an all-female VMI, the experts concluded that the VWIL program would have substantial positive consequences for Virginia's women. Harvard sociologist David Reisman testified that

> [g]iven the women now coming to higher education, what is offered in VWIL is a model for the country, with potentially enormous consequences to reverse the unhappy, often unequal, output of education.

II JA 474. Dr. Elizabeth Fox-Genovese noted that having a publicly-supported single-sex education program for

women is important because the private colleges which offer single-sex education to women are usually very expensive, thereby placing this option out of reach of many or most women. II JA 291.[16]

Finally, petitioner's argument implicitly assumes that the adversative system and the hierarchical leadership style which follows from it are inherently superior to systems of learning and leadership based on empathy and interdependence. The former is defined (some say culturally defined) as "masculine," and the latter as "feminine."[17] The present reality is that most women respond to one and most men to the other. Whether this present reality is simply cultural in most individuals or is more deeply rooted, Virginia and South Carolina have sought to respond to the situation which presently exists. This entire case has been characterized by petitioner's unspoken claim, more denigrating to women than could

---

[16] Research continues to affirm the efficacy of single-gender colleges for women. A very recent report from UCLA (in which the authors acknowledge "assistance and commentary" by Professor Astin) cites findings that attending a women-only college "has a positive effect on students' academic ability" and that women's colleges provide opportunities to develop "social self-confidence," which in turn may "provide a long-term foundation for higher proportions of career achievers" compared to their co-educational counterparts. The authors conclude that "public policy makers would be well advised to continue support for women-only colleges." Kim and Alvarez, *Women-Only Colleges, Some Unanticipated Consequences*, 66 J. Higher Educ. 641, 661-662 (1995).

[17] These concepts are discussed more fully, although from a position opposing Virginia's position, at pp. 24-25 of the brief of amici American Association of University Professors, *et al.*

be claimed of any state policy, that of the two methods only those used by VMI and The Citadel can train women to be effective citizens and leaders.

C. Equality of treatment is served in this case by single-sex programs whose equality is attained by comparability in substance rather than by identity of methodology.

This case does not present simply another instance of admitting women to an area from which they have been improperly barred. It is far different from most prior gender discrimination cases, where the only practical result was to benefit all women, or at least those who chose to be benefitted, without injury to the interests of any other women, much less most women within the class originally subjected to discrimination.

The easiest answer for this Court would be simply to accept the Petitioner's argument, and accordingly to require VMI and The Citadel to admit women if the schools are to remain state-supported. This, however, would permit the claims of a tiny minority of women to trump the interests of practically all women and men interested in state-supported single-gender education. The court below wisely rejected such a facile result; instead it correctly recognized that in this situation, equal treatment does not and should not mean identical treatment.

The court below determined that the standard intermediate scrutiny test in gender discrimination cases would not work in a case such as this where both prongs

of the test (an important state interest and a means substantially related to its achievement) could be satisfied while still possibly leaving unaddressed the claims of women to a similar state-sponsored benefit. The court's recognition that the standard test was inadequate to protect the rights of the gender claiming discrimination led the court to impose a third requirement: that when state action validly serves an important state interest in offering a benefit to one gender, the state must offer the other gender a benefit comparable in substance. 44 F.3d at 1237. This test balances the need for equality with the recognition that identity would be of little practical value if almost no one stood to benefit under such a definition of equality. The court's test also avoids eliminating a program found to serve an important state interest through means substantially related to that end.

In creating parallel programs for women, Virginia and South Carolina have recognized their responsibility under the Equal Protection Clause. The two states clearly did not intend to discriminate against women when they discontinued single-gender programs for women in the early 1970's while VMI and The Citadel continued to exist. By seeking to remedy this brief historical anomaly, Virginia and South Carolina tried to avoid the dual extremes of creating a female VMI or Citadel which would likely fail, or of creating programs which would limit their graduates to occupations representing former stereotypes. Instead, the States have sought to offer to women leadership programs which were designed to maximize the chances that their graduates would have overcome whatever barriers to effective leadership they may have faced upon entering college. The states are

endeavoring to do this by making the benefits of single-sex education available to both sexes, thereby affording to both sexes the enhanced opportunity which single-sex education provides for learning self-discipline, teamwork, and the practice of leadership. Coeducation is merely one among several methods of education. It should not be elevated to the level of a constitutional imperative.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the judgment of the court below should be affirmed.

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Nos. 94-1941 and 94-2107

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *Petitioner,*

v.

COMMONWEALTH OF VIRGINIA, *et al.*, *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF LATE DUE TO ERROR IN FILING PROCEDURE

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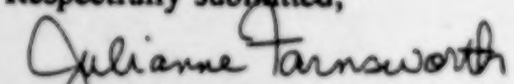
Movant, The South Carolina Institute of Leadership for Women, appearing as amicus curiae, hereby respectfully moves this Honorable Court for leave to file its amicus curiae brief on behalf of the Respondents late. As grounds for this motion, movant states the following: movant was granted permission, by consent, to file an amicus curiae brief in the above captioned case. After the brief was prepared, it was sent to Brief Printing Specialists, Inc., 1001 E. Main Street, Suite 210, Richmond, Virginia 23219, with specific instructions that the brief had to be filed with this Honorable Court no later than Friday, December 15, 1995. The Certificate of Service from the printer indicated that the brief was filed with this Court on December 15, 1995. However, the Clerk of this Court brought to our attention on today's date, December 28, 1995, that the brief was filed by certified mail on December 15, 1995, but was not received by this Court

until December 19, 1995. As a result, the brief was considered late. The printers have acknowledged the filing error and have indicated that they believed in good faith that filing by certified mail on December 15, 1995, was acceptable filing to meet the specified deadline. Due to the fact that the error was made in good faith by a third party, the printing company, and the brief was received only two days late, via certified mail, by this Court, Movant respectfully requests that the brief be accepted as if filing had occurred timely and be considered by the Court in support of Respondents in this case.

Respectfully submitted,



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *Petitioner,*

v.

COMMONWEALTH OF VIRGINIA, *et al.*, *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE SOUTH CAROLINA INSTITUTE OF LEADERSHIP FOR WOMEN IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICUS CURIAE

The South Carolina Institute of Leadership for Women (SCIL) at Converse College in Spartanburg, South Carolina, commenced in 1995 to provide young women the opportunity to receive publicly supported single-gender education. SCIL is designed to achieve, through a single-gender leadership program for women, benefits comparable to the benefits The Citadel Corps of Cadets achieves through a single-gender leadership program for men. SCIL's 1995-96 class includes twenty-two young women who have enrolled in the program to obtain the knowledge, skills, character, and experiences which will allow them to take positions of leadership in the private and public arena, including the military. These twenty-two young women have a substantial interest in the outcome of this case. As will be discussed more fully herein, the controlling principles that are present in *United States v. Commonwealth of Virginia, et al.*, 44 F.3d 1229 (4th Cir. 1995),

cert. granted, 116 S. Ct. 281 (1995) are extremely important to these young women and to their continued right to have the opportunity to participate in this unique, publicly supported single-gender educational program. Therefore, the students of SCIL submit this brief as amicus curiae to bring to the Court's attention their interest in this review of the VMI litigation and to urge affirmance of the decision of the court of appeals.[1]

STATEMENT

Converse College, a private four-year women's college, was founded in 1889. For one hundred six years, Converse College has been preparing women for leadership. Recruiting publications assert that a Converse College education prepares young women "for informed and responsible decisionmaking, reasoned and humane

[1] The written consents of the parties to the submission of this amicus curiae brief have been filed with the Clerk of the U.S. Supreme Court pursuant to Sup. Ct. R. 37.3.

action, and significant and influential achievement." 1994-1995 Converse College Catalog at 7-8. The development of leadership has always been an important and integral aspect of the educational program at Converse College. In 1993, Converse College began developing a more formal and focused approach to its leadership education, which resulted in the establishment of a leadership curriculum.

In 1993, the South Carolina General Assembly was also addressing single-gender higher education in South Carolina. In May 1993, the General Assembly adopted a resolution affirming a "policy of choice" which included offering citizens of South Carolina the option of single-gender higher education. "South Carolina has historically supported and continues to support single-gender educational institutions as a matter of public policy based on legitimate state interests where sufficient demand has existed for particular single-gender programs thereby justifying the expenditure of public funds to support such

programs." S.C. H. Con. Res. 4170, 110th Leg., 1st Sess. (1993). To deal squarely with the fact that South Carolina's state-supported educational institutions did not include such an option, the General Assembly established a 10-member committee and directed them to formulate recommendations for the General Assembly to consider in exploring alternatives for the provision of single-gender educational opportunities for women. The committee was charged with preparing a report and submitting it to the General Assembly at the beginning of the 1994 Session. A report was prepared and submitted in January 1994. This report concluded that any single-gender educational opportunity for women should achieve the same educational objectives which are provided for the young men who attend The Citadel. January 1994 Report, Legislative Committee to Study the Provision of Single-Gender Educational Opportunities for Women.

In April of 1995, the court of appeals held that "[i]f [South Carolina] elects to maintain single-gender education at The Citadel, then it must provide parallel programs for men and women that are substantively comparable." *Faulkner v. Jones*, 51 F.3d 440, 448 (4th Cir. 1995).

The South Carolina General Assembly, as part of the 1995-96 General Appropriations Act, passed a resolution reaffirming South Carolina's commitment to single-gender education, finding that opportunities to attend a single-gender college fulfill an important and legitimate state objective and stating that the single-gender offerings need not be identical in form and detail but should be designed to achieve substantively comparable outcomes. 1995 S.C. Acts 145, Part II, §§ 95(A)-(B).

Simultaneous with the passage of the resolution, the South Carolina General Assembly approved the concept of SCIL by enacting legislation providing for long-term funding for SCIL. *Id.* Included in this funding amendment

to the 1995-96 General Appropriations Act was language that stated: "This section takes effect upon approval of this act by the Governor, but shall be void and of no effect if the United States Supreme Court issues a ruling which reverses the holding in *U.S. v. Commonwealth of Virginia*, 44 F.3d 1229, 1232, 1238 (4th Cir. 1995)." Journal of the Senate of the State of South Carolina, No. 67 (May 4, 1995).

Thereafter, an agreement was entered into in June of 1995 between the State of South Carolina and Converse College establishing SCIL. South Carolina desired to establish a state-supported leadership institute for women. Converse College desired to offer a state-supported leadership institute as part of the leadership program available to its undergraduate students.

The mission of SCIL is to prepare women, as The Citadel mission prepares men, "for post-graduate positions of leadership through academic programs of excellence"

supported by an environment that fosters the "growth and development of character, physical fitness, moral and spiritual principles, thereby preparing its students to meet the requirements of citizens and especially of leaders." South Carolina's Proposed Remedial Plan.

SCIL was designed by experts in higher education, who concentrate on women's education and development, to provide college-age women the benefits of single-gender education, discipline, and leadership training that The Citadel provides to college-age men.[2] SCIL's mission and goals parallel those of The Citadel. As with The Citadel,

[2] Students who are enrolled in SCIL must complete the academic undergraduate program at Converse College, plus complete a total of four courses in science, eight courses in health and physical education, and calculus. Additionally, the students must complement their academic program by required ROTC participation, which includes summer experiences and special residential lief program requirements. Further, SCIL students complete a twenty-one semester hour sequence of academic courses called the Converse Leadership Program.

single-gender education forms the core of the SCIL experience.

The enrollment of SCIL for the 1995-96 academic year includes twenty-two young women, both freshmen and transfer students, who have all exhibited achievement in academic and physical fitness, have exhibited potential for leadership, and are extremely qualified and capable to meet the demands of SCIL.[3] If given the opportunity, they each have the ability and commitment to successfully complete the program and to be prepared to "meet the requirements of citizens and especially of leaders." South Carolina's Proposed Remedial Plan.

However, if the principle of a publicly funded single-gender educational program for women that is substantively comparable to the publicly funded single-gender educational program for men, is not upheld by this Court as being a

[3] See Appendix A for detailed descriptions of the twenty-two students who enrolled in SCIL in the fall of 1995.

legitimate governmental objective and constitutional, then the State of South Carolina is released from its obligation to provide funds to Converse College to support SCIL, and Converse College is under no further obligation to continue to operate the program. Agreement between the State of South Carolina and Converse College, June 5, 1995, para. 9. Therefore, what occurs in this review is of utmost importance to the students enrolled in SCIL and to future college-age women in South Carolina who may desire to pursue similar educational experiences.

SUMMARY OF ARGUMENT

Single-gender educational opportunities have been found by the Fourth Circuit Court of Appeals to be beneficial for both men and women. *United States v. Commonwealth of Virginia*, 976 F.2d 890, 897-98 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993) ("VMI I"); *see also United States v. Commonwealth of Virginia*, 44 F.3d

1229, 1239 (4th Cir. 1995), *cert. granted*, 116 S. Ct. 281 (1995) ("VMI II").[4]

In VMI I, Judge Niemeyer found that the evidence in the case "amply demonstrated that single-genderedness in education can be pedagogically justifiable . . . . [W]hile the data support a pedagogical justification for a single-sex education, they do not favor either sex. Both men *and* women appear to have benefitted from a single-sex education in a materially similar manner." VMI I, 976 F.2d at 897-898 (Emphasis in original). In VMI II, the court held "that single-gender education at the college level is benef cial to both sexes is a fact established in this case." VMI II, 44 F.3d at 1238.

The Fourth Circuit Court of Appeals has also held that the single-gender educational programs offered at Virginia Military Institute (VMI) and Virginia Women's Institute for

[4] For sake of conciseness, cites hereinafter to these two cases will be referred to as VMI I and VMI II.

Leadership (VWIL) pass constitutional scrutiny because, although they are not identical, they are substantively comparable.[5] VMI II, 44 F.3d at 1241.

The Fourth Circuit has further stated, on several occasions, that the principles of VMI I and VMI II apply to the facts of the controversy involving The Citadel and the issue of whether the State of South Carolina's parallel program, SCIL, is substantively comparable to The Citadel's. *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993); *Faulkner v. Jones*, 51 F.3d 440, 447, 448 (4th Cir. 1995).

Consequently, the ruling of this Court on the writ of certiorari before it not only affects the concept of single-

[5] The court qualified this holding by stating that the VWIL program, which at that time was at its incipiency, be undertaken with a persistently high level of commitment by the State of Virginia. VMI II, 44 F.3d at 1241. Since that decision was rendered on January 26, 1995, both VWIL at Mary Baldwin College and SCIL at Converse College are proving to be successful single-gender educational programs.

gender education in the State of Virginia and the State's right to designate it as an important governmental objective, but also directly affects and controls the existence and continuation of publicly supported single-gender education in South Carolina that exists for both sexes.

The reversal of VMI II would undermine and threaten the rights of young women to choose to participate in a unique single-gender educational experience that is provided to young men in South Carolina. Despite the fact that the State of South Carolina has enthusiastically come forward to establish a publicly funded single-gender educational opportunity for its young women, if the concept of a constitutionally permissible, substantively comparable alternative is not approved, that opportunity will cease to exist.

ARGUMENT

A. Single-Gender Education Is Beneficial to Both Sexes and Public Support of Single-Gender Educational Programs Constitutes a Legitimate and Important Governmental Objective.

Petitioner and amici curiae filing briefs in support of petitioner's argument that substantively comparable educational programs are unconstitutional would have this Court ignore the well-reasoned analysis of the district court and the court of appeals and find a constitutional violation where in fact one does not exist. A review of the arguments of the petitioner and the supportive amici curiae do nothing more than establish that the groups are fundamentally opposed to the concept that single-gender education is beneficial and public support of it is justifiable. As an example, the amici brief filed in support of petitioner by twenty-six private women's colleges begins its analysis with an endorsement of single-gender education (Brief of Twenty-Six Private Women's Colleges as Amici

Curiae in Support of Petitioner at 2-3), yet concludes that only *private* single-gender education is beneficial and VMI II, which held that single-gender education can constitute a legitimate governmental objective, should be reversed.

Beginning with Judge Kiser's opinion in *United States v. Commonwealth of Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991), the District Court of the Western District of Virginia and the Fourth Circuit Court of Appeals have carefully considered the evidence presented with regard to the benefits of single-gender education and have concluded that single-gender education at the college level is beneficial to both sexes and that the option of a publicly supported single-gender college education may be given to the citizens by a state. VMI II, 44 F.3d at 1239.

> Just as a state's provision of publicly financed education to its citizens is a legitimate and important governmental objective, so too is a state's opting for single-gender education as one particular pedagogical technique among many. Although there remains some disagreement among the experts about the extent of the benefits of single-gender education, it is not our role to resolve that issue. It is enough that there is a growing consensus in the professional community that a sexually homogeneous environment yields concrete educational benefits. Thus, we should defer to a state's selection of educational techniques when we conclude, as we do here, that the purpose of providing single-gender education is not pernicious and falls within the range of the traditional governmental objective of providing citizens higher education.

Id. at 1239.

The court below has carefully considered the constitutionality of publicly supported single-gender education and has found that substantively comparable programs provide opportunities for men and women that pass Equal Protection Clause constitutional scrutiny.

The State of Virginia chose to provide a "parallel program" at Mary Baldwin College in Staunton, Virginia, and therefore to establish the Virginia Women's Institute for Leadership. The district court subsequently reviewed the plan and approved it. *United States v. Commonwealth of Virginia*, 852 F. Supp. 471 (W.D. Va. 1994). The

Fourth Circuit Court of Appeals then affirmed the district court's decision by review of the plan pursuant to a modified constitutional scrutiny test peculiar to this case. *See, e.g., Craig v. Boren*, 429 U.S. 451 (1976).

> Application of this traditional test . . . to a case where the classification is not directed per se at men or women, but at homogeneity of gender, presents a unique problem, because once the state's objective is found to be an important one, the classification by gender is by definition necessary for accomplishing the objective and might thereby bypass any equal protection scrutiny. The second prong of the test thus would provide little or no scrutiny of the effect of a classification directed at homogeneity of gender. Thus, in order to measure the legitimacy of a classification based on homogeneity of gender against the Equal Protection Clause, we conclude that we must take the additional step of carefully weighing the alternatives available to members of each gender denied benefits by the classification.

VMI II, 44 F.3d at 1237. In other words, the Fourth Circuit Court of Appeals strove to determine whether "excluded men and excluded women have reasonable opportunities to obtain benefits substantively comparable to

those they are denied." *Id.* at 1239-1240. The court ultimately concluded that Virginia's plan provided "to both genders benefits comparable in substance, but not in form and detail." *Id.* at 1240. These substantively comparable benefits have been found to be constitutional and not to violate the Equal Protection Clause, and the court's finding on this issue should be affirmed.

The dissent in VMI II roundly criticized the majority's conclusion, as have petitioner and amici curiae in support of petitioner. Focusing on the "substantial relationship prong" of the intermediate scrutiny test, the dissent essentially agreed with the majority by saying that:

> no such arrangement (of separate single-gender schools) could be found *substantially related* to any conceivable governmental objective unless the benefits to be separately distributed by the arrangement were *substantively* equal across the board of the relevant criteria for evaluating educational institutions.

VMI II, 44 F.3d at 1249 (Phillips, J., dissenting). The dissent then attacked the criteria used by the majority,

however, saying it should have employed the standard enunciated in *Sweatt v. Painter*, 339 U.S. 629, 633-634 (1950) (requiring "substantial equality in educational opportunities" to justify separate state-supported law schools for white and black students, and not finding it upon considering both tangible resources such as "scope of library" and intangible resources such as "position and influence of the alumni," "traditions and prestige"). The rationale for using this criteria, the dissent claimed, is that "the proper perspective from which to measure substantial equality of available benefits is that of the potential student who *could* be admitted to either school and has a choice." VMI II, 44 F.3d at 1249 (Phillips, J., dissenting). Thus, the dissent concluded that VWIL can never provide "substantially equal" benefits as VMI provides because it was not started at the same time, it does not have the same prestige, alumni network, etc. Indeed, the dissent then offered as a "paradigm" for compliance with such a standard:

> simultaneously opened single-gender undergraduate institutions having substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, and faculty and library resources. Such an arrangement would involve no gender-line discrimination in terms of tangible benefits, nor of intangible benefits such as tradition, prestige and alumni influence -- as to which each starts with none.

Id. at 1250.

The flaws in the dissent's logic are numerous. First, *Sweatt v. Painter* addresses racial discrimination, not gender discrimination, and thus the classification at issue in that case was subject to the most exacting type of scrutiny -- strict scrutiny. Though the dissent recognized this fact, it merely brushed that consideration aside saying "I see no reason why the same requirement of *substantial* equality of benefits that was thought at one time to justify separate-but-equal schools for the different races should not apply to separate schools for men and women if that classification now does, as race formerly but no longer does, permit

separate-but-equal arrangements." VMI II, 44 F.3d at 1249 (Phillips, J., dissenting)(emphasis in original).

The dissent in VMI II and the arguments of petitioner and supporting amici curiae urge this Court to reject the reasoned Fourth Circuit analysis and find that the single-gender educational programs that exist at VMI and VWIL violate the Equal Protection Clause. These arguments are not based on the law of this Court and should be rejected.

B. THE PRINCIPLES OF VMI I AND VMI II AND THEIR PRECEDENTIAL VALUE HAVE BROAD IMPLICATIONS FOR OTHER INSTITUTIONS OF HIGHER LEARNING AND THE STUDENTS WHO ARE ENROLLED IN THEM, AND THESE IMPLICATIONS SHOULD BE CONSIDERED BY THIS COURT.

It is undisputed that similarities exist between the issues addressed in the VMI litigation and issues that exist in The Citadel litigation. The Fourth Circuit Court of Appeals has stated in at least two decisions that the VMI principles of law were controlling in The Citadel litigation. *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993);

Faulkner v. Jones, 51 F.3d 440, 447, 448 (4th Cir. 1995). The parties and the Court in The Citadel litigation have agreed that due to the similarities certain VMI conclusions of law would apply in The Citadel litigation. *Faulkner v. Jones*, 858 F. Supp. 552, 555 (D.S.C. 1994).

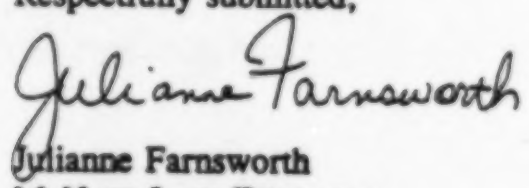
As a result of this overlap of principles and similarity of issues, SCIL, as amicus curiae in this case, submits to the Court that the implications of this decision are broad and far reaching and not only will dictate the course of events for present and future students of VMI and VWIL, but also for other young men and women across the country. Just as Nancy Mellette, in her amicus brief supporting the petitioner, asserts that she has a "very substantial" interest in the outcome of the Court's review of the VMI decision (Amicus Brief of Nancy Mellette in Support of Petitioner at 1), the twenty-two SCIL students assert that they have an even stronger interest than Nancy Mellette or the other amici curiae who filed briefs in

support of the reversal of the VMI II decision in the outcome of this Court's review of this case. The twenty-two SCIL students, unlike Nancy Mellette, or Lieutenant Colonel Rhonda Cornum, USA, or the American Association of University Professors, are not prospective participants, past participants, or interested observers in an educational program, but are actual participants in an on-going educational program whose continued existence depends specifically on whether this Court affirms the VMI II holding that substantively comparable single-gender educational programs are constitutionally permissible. Consequently, due to the overlap of the controlling legal principles and the extremely substantial interest these twenty-two students at SCIL have in this case, this amicus curiae respectfully urges the Court to affirm the findings of VMI II.

CONCLUSION

For the reasons stated in this brief, amicus curiae South Carolina Institute of Leadership for Women requests that this Court affirm the judgment of the court of appeals.

Respectfully submitted,



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December 15, 1995

APPENDIX A

South Carolina Institute of Leadership for Women

1995-96 Student Profiles

Bhatty, Komilla
Birthplace: India
Boarding, Transfer, Full-time
Languages Spoken: English, Urdu, Punjabi, Hindi
Activities: Athletics, Writing, Peer-tutoring

Burgess, Rachel Elizabeth
Birthplace: Greenville, South Carolina
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: Art, Religion, Athletics, Beta Club, FCA

Burgess, Robin Melanie
Birthplace: Chester, South Carolina
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: Beta Club, Junior Palmetto Leadership, Peer Leaders, Band, Youth Group, Teen Institute, TH-M, Church Choir, Rainbow, Spanish Club

Choice, Sharaiah Octavia
Birthplace: Charleston, South Carolina
Boarding, Freshman, Full-time
Languages Spoken: English, French
Activities: Beta Club, Student Government, Yearbook, Science Club, Who's Who Among American High School Students, Cheerleader, Athletics, Choir

Dansby, Nakia
Birthplace: Spartanburg, South Carolina
Boarding, Junior, Full-time
Languages Spoken: English

Eller, Evelyn Athena
Birthplace: Spartanburg, South Carolina
Boarding, Transfer, Full-time
Languages Spoken: English

Flowe, Chelsea Lynne
Birthplace: Huntington Beach, California
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: Student Council, Academic Decathlon, Band/Orchestra, California Scholarship Federation, Physics Club, Octagon Club, Swim Team

Grant, Meryl Sydney
Birthplace: Charleston, South Carolina
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: Band, Girl Scouts, Junior Classical League, Interact

Hall, Kimberly Rochelle
Birthplace: Winnsboro, South Carolina
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: Beta Club, National Honor Society, Academic Challenge Team, Library Club, Science Club, Social Studies Club

Hammond, Kelly Christina "K.C."
Birthplace: Charlotte, North Carolina
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: Concert Choir, Show Choir, Madrigals, Jazz Singers, Symphonic Band, Marching Band, Church Youth Choir, Church Youth Group, National Junior Honor Society, Governor's School for the Arts, Student Council, Beta Club

Kennerty, Rachel Kathleen
Birthplace: Charleston, South Carolina
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: Yearbook, Mock Trial Team, Varsity Soccer, Bible Club, Band, Teacher Cadet, Senior Board, Prom Committee, Senior Spirit Club

Krueger, Katherine Skye
Birthplace: Spartanburg, South Carolina
Boarding, Freshman, Full-time
Languages Spoken: English, German
Activities: Church Group, Red Cross, Dancing, Interact, Athletics, National Honor Society, 1993 Who's Who Among American High School Students, 1996 American Achievement Academy

McIsaac, Olivia
Birthplace: Kershaw, South Carolina
Boarding, Sophomore, Full-time
Languages Spoken: English
Activities: Fellowship of Christian Athletes, Student Government Association

Neal, Katherine Elise
Birthplace: Ohio
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: Athletics, Concert Band, Junior Civitan, Student Council, Beta Club, AP Chemical Illusions Group, United Way of the Piedmont Youth Advisory Council, Athletic Booster, US Junior Olympic Volleyball Team

Pierce, Marjorie Dawn
Birthplace: North Charleston, South Carolina
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: FHA, Church Chorus, Basketball, Softball, Humanities, Spanish Club

Roland, Rebecca Elizabeth
Birthplace: Columbia, South Carolina
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: Theater, Athletics, Cheerleader, Pep Club, FCA

Thompson, Cassie
Birthplace: Fort Mill, South Carolina
Boarding, Junior, Full-time
Languages Spoken: English

Toussaint, Mary Ann
Birthplace: Alabama
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: ROTC, Latin Honor's Society, Honor Society, Foreign Exchange Student, Horseback Riding

Whitesides, Kelly Elizabeth
Birthplace: Auburn, Alabama
Boarding, Freshman, Full-time
Activities: Interact, Varsity Cheerleading, Yearbook, Senior Superlative Recipient

Whitmore, Janet Brooke
Birthplace: Florida
Boarding, Transfer, Full-time
Activities: Yearbook, Student Council, Spanish Club, Clarinet, Soccer, National Honor Society

Woodall, Charis Marie
Birthplace: Anderson, Indiana
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: County Orchestra, Community Service Gardening Club Zoo Magnet Program, National Honor Society, French National Honor Society, Key Club, French Club, French Award, Music Theory Award, American Government Citizenship Award, Orchestra Award, AB Honor Roll Freshman, Sophomore and Junior Years

Woodward, Anzer Michelle
Birthplace: Charleston, South Carolina
Boarding, Freshman, Full-time
Languages Spoken: English
Activities:Student Council, Key Club, African-American Society, DAFY (Drug, Alcohol-Free Youths), County Conservatory Oratory Awards

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BRIEF OF MARY BALDWIN COLLEGE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

Mary Baldwin College ("MBC") is a private four-year, liberal-arts college for women located in Staunton, Virginia. Founded in 1842, MBC has a long history of providing higher education in a single-sex setting and a track record of developing innovative degree programs. Total enrollment is over 2000. Approximately 800 women attend the four-year residential undergraduate program at the MBC campus, which successfully prepares its graduates for pursuit of careers as leaders in business and the professions.

MBC agreed to create the Virginia Women's Institute for Leadership ("VWIL") to serve as a remedy in this litigation, for three reasons. First, MBC believes that single-sex education conveys unique educational benefits and should be available to both women and men. Second, MBC is convinced that a wide array of educational options is crucial to the future strength of this Nation and should be publicly available. Third, VWIL presents an extraordinary opportunity; it is a forward-looking program which serves a real need for the young women of today.

SUMMARY OF ARGUMENT

VMI and MBC are unique institutions with their own distinctive campuses, histories, and cultures. Each has course offerings, facilities and traditions that are not found at the other. Such differences are inevitable whenever two colleges are compared. The courts below held that a parallel program for women need not be identical to VMI, and that differences can be justified by a variety of relevant factors.

The government and its *amici* have argued, to the contrary, that any significant difference between VMI and VWIL is constitutionally intolerable, and that the only acceptable remedy is to require VMI to admit women. This is tantamount to a position that coeducation is constitutionally mandated. It would be virtually impossible for a state to maintain separate educational institutions for men and women that are identical in all respects. It would also be unwise to require such institutions to mirror each other when the needs and interests of the students at each institution may differ.

The design of the VWIL program reflects the best professional judgment of the faculty and administration of MBC. VWIL's content and methodology are based on contemporary research on leadership and the benefits of single-sex education. The program is founded on the belief that women can and do provide significant leadership in the military and other traditionally male-dominated fields, that career opportunity is not restricted by gender, and that single-sex education is for many women better than coeducation in achieving these goals.

Although the outcomes of the two programs are in all significant respects the same, the VWIL program differs somewhat from VMI in how these outcomes are achieved. These differences are the result of a careful planning process and are not the consequence of inattention or stereotypical views about the roles or abilities of women. The courts below properly found that the VWIL program is soundly designed and fully capable of meeting its objectives.

In addition to its interest in maintaining the VWIL program, MBC supports the option of single-gender education for males and females. The courts below in this case have found that single-sex education is pedagogically justified for both men and women. MBC also believes that, for legal and practical reasons, single-sex education for women will be threatened if single-sex education for men is outlawed.

ARGUMENT

I. THE VWIL PROGRAM AT MARY BALDWIN COLLEGE PROVIDES SUBSTANTIAL BENEFITS THAT WOULD NOT BE AVAILABLE UNDER THE GOVERNMENT'S PROPOSED REMEDY OF A COEDUCATIONAL VMI.

A. Mary Baldwin College Designed the VWIL Program to Suit the Needs and Abilities of Real Students, Not Stereotypes.

The Equal Protection Clause does not dictate that MBC conduct a program identical to that of VMI. However, the Court's analysis of this constitutional issue should be based upon an accurate characterization of the VWIL program, not the exaggerated presentation found in briefs submitted by certain of the government's *amici*. Those briefs would lead the Court to believe that the VWIL program is a "watered-down VMI" founded on archaic stereotypes about women rather than on careful analysis. Such caricatures of VWIL are contradicted by the facts in the record.

The VWIL program was designed by a task force of educators, not by lawyers. The charge of the Task Force was to design the best possible baccalaureate program for women that would produce ambitious and capable graduates, providing the nation with leadership in the public and private arenas.

The Task Force was created by MBC's President, Cynthia H. Tyson, and co-chaired by Dean James D. Lott and Dean Heather Anne Wilson. Dr. Tyson, Dr. Lott and Dr. Wilson collectively have more than 70 years' experience in single-gender education for women. The Task Force included faculty members, administrators and students; it also called upon *ad hoc* members with expertise in the areas of physical education and training, computer science, ROTC, and developmental psychology.

VWIL began operation in August 1995 and is already

achieving its goals. There are far more similarities between the VWIL and VMI programs than there are differences. Both are intellectually and physically rigorous, highly structured single-sex baccalaureate programs. Both develop students' leadership skills, foster self-discipline and personal integrity, and cultivate team-building skills. An important factor in both is the building of a sense of community and of personal responsibility to that community. And both provide many opportunities for the practice of leadership in a variety of settings.

To be sure, the VWIL program differs in a number of ways from the VMI program. Some of these differences are the result of predictions by MBC and its Task Force about the needs and interests of the students who would attend the VWIL program. These predictions were not based on outmoded stereotypes but instead reflect actual experience in women's education and a recognition that there are often real differences in the physical and developmental characteristics of college-age men and women.

Educational programs such as VWIL must be designed to attract and meet the needs of students with a range of abilities and interests.[1] The demand for residential military college programs among women is quite small. MBC determined that there would be little, if any, demand for a women's program that adopted all of the elements of the VMI system. There has never been, and no educational expert (including the government's experts in this case) has ever recommended, the establishment of a military college

[1]For this reason, designing an educational program is not analogous to the situation presented in *J.E.B. v. Alabama, ex rel. T.B.*, 114 S. Ct. 1419 (1994). A peremptory strike necessarily applies to a particular individual. A college program cannot be designed to fit the particularized needs of each student.

program for women including the rat line and other elements of the extreme adversative method at VMI.

It would have been possible to design the VWIL program to more closely resemble VMI, with adversative techniques associated with the rat line and barracks-like living quarters. Simply replicating an existing program would have required far less thought, research, and educational expertise. But such a facile approach would have produced a paper program with no real prospect of successful implementation. MBC believes it would be professionally irresponsible to compromise student welfare by designing a program to meet litigation objectives instead of student needs.

B. The VWIL Program is a Rigorous, Multi-Disciplinary Educational Experience That Is Designed to Achieve Outcomes Comparable to Those Produced by VMI.

Both VWIL and VMI offer students the substantial benefits of a single-sex educational environment. Just as important to the outcome is the augmentation of these benefits with a holistic, 24-hour-a-day leadership development environment. Both programs are highly structured and mentally and physically rigorous. In both programs, academic requirements, co-curricular activities, student government, and residence life are interrelated and geared toward the building of personal integrity and leadership skills. The five central goals of the two programs are identical: rigorous baccalaureate-level education, military training, mental and physical discipline, character development, and leadership development. Both programs have the mission of producing "citizen" soldiers.

The outcome for students in both programs is preparation for successful careers and leadership in whatever field they choose; no distinction is made by either VWIL or VMI in terms of what careers or avocations are "appropriate" for either sex. In fact, the VWIL requirements in military

training, math, science, and computer science explicitly encourage women to explore and excel in traditionally male-dominated fields.

In VWIL, students must complete four interdisciplinary courses which provide students with an awareness of what leadership requires. Moreover, as at VMI, within VWIL there are many opportunities to practice leadership, in addition to the over 150 leadership positions available in the residential MBC undergraduate program as a whole.

The VWIL and VMI physical and health education programs require the same amount of training. In each program, students must take physical fitness tests, complete eight semesters of physical education courses, and undergo additional physical training. The physical fitness standards for the women in VWIL are just as strenuous as those for men at VMI. VWIL's "leadership challenge" program, mandatory for all freshmen who are not participating in varsity athletics, is directly analogous to and uses many of the same facilities as VMI's rat challenge, which is mandatory for all first-year students except those who are participating in varsity athletics.

Both programs require four years of ROTC training, and in fact the ROTC requirements of VMI cadets and VWIL cadets are identical. The same options are available to students in the two programs--Navy, Marine Corps, Army, and Air Force--and all VMI and VWIL students may elect to seek a commission. In fact, ROTC scholarships are held by students in both programs. Seeking a commission is, however, not mandatory in either program. Each student spends two hours in class and lab each week; the facilities, faculty, and options for VWIL and VMI cadets are exactly the same. In addition to ROTC activities, VMI cadets drill within their cadet corps, and VWIL students spend about 25 hours a semester in drill and ceremonies training on the MBC campus.

Both programs develop strong bonding and sense of

community among the students. In VWIL, this process started during the VWIL orientation week, prior to regular MBC freshman orientation. This VWIL orientation included a variety of mentally and physically challenging activities. At both VMI and VWIL, mandatory co-curricular activities contribute to the development of community.

In short, the goals of VWIL and VMI are the same, and the methodologies employed to attain those goals have many of the same elements.

C. There Are Legitimate Reasons for Differences Between the VWIL and VMI programs.

The VWIL program differs somewhat from VMI but is not inferior.[2] Some of these differences are attributable to the fact that the VWIL program operates in conjunction with the traditional undergraduate program at MBC. The Task Force decided that VWIL students should not reside in a separate dormitory for four years, wear uniforms at all times, or eat their meals apart from the other MBC students. These decisions were based not on stereotypical assumptions but on their professional judgment that the VWIL students would have a more satisfactory college experience, with more opportunities for leadership, if they

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[2]The government does not argue that the financial support provided by the Commonwealth to VWIL is inadequate or unequal to that provided to VMI. The remedial plan requires the Commonwealth to provide financial support for students attending the VWIL program that is equal to that provided for VMI students. In addition, the VMI Foundation will provide the VWIL program with a permanent endowment of $5.4625 million and make other financial contributions to bring the total to nearly $7 million, an amount which one expert witness described as "lavish" for a program of this kind. Remedy Tr. 1543-44.

were integrated into the larger MBC community.

There are also some differences due to institutional autonomy. For example, MBC believes that its honor code is as effective in defining responsibility to the community and inculcating integrity as VMI's honor code. It would be the height of irony for the government, in the name of women's rights, to seek to compel MBC to abandon its traditions and mimic the practices of VMI when there is no good reason to do so.

Finally, there are differences resulting from the fact that VWIL is a new program and VMI has been in existence for many years. There are benefits to participation in a new program, which can include a sense of excitement and challenge that may not be available to those who simply follow the traditions of the past. The VWIL program has been designed in light of the most current research on leadership development and educational methodology. VWIL students also share in the traditions of MBC and will have the benefits of the alumni networks of both MBC and VMI.

In summary, while the VWIL program is admittedly different in some respects from the VMI program, these differences have legitimate justifications and generally enhance the value of the program to its participants. MBC believes, and the courts below agreed, that the VWIL program offers women benefits that are at least as valuable as those offered to men by VMI.

II. RECENT STUDIES DEMONSTRATE THAT SINGLE-SEX EDUCATION PROVIDES SUBSTANTIAL BENEFITS TO WOMEN.

An impressive body of recent studies demonstrates that single-sex schools lead to higher achievement and self-esteem in women, encourage women to pursue traditionally male-dominated careers, and alleviate some of the disadvantages a number of women may suffer in a coeducational setting.

A. Single-Sex Education Contributes to Higher Academic Achievement and Self-Esteem in Women.

Recent studies strongly suggest that, at both the secondary and college levels, women in single-sex schools not only outperform their peers in mixed-sex schools, but show higher levels of self-esteem and a greater sense of personal control.

In one of the most frequently cited of these studies, Professors Valerie Lee and Anthony Bryk compared the effects of single-sex and mixed-sex Catholic secondary schools on a number of specific variables, including areas of academic achievement, achievement gains, educational aspirations, self-image, sense of personal control over environment, and attitudes and behaviors related to academics.[3] *See* Valerie E. Lee & Anthony S. Bryk, *Effects of Single-Sex Secondary Schools on Student Achievement and Attitudes*, 78 J. EDUC. PSYCHOL. 381 (1986) (hereinafter "Lee & Bryk (1986)"). Analyzing data from a longitudinal study of randomly-selected high school sophomores and seniors entitled "High School and Beyond," Professors Lee and Bryk "found that single-sex schools appear to deliver specific advantages to their students." *Id.* at 394. Relative to their peers in the coeducational schools, girls from the single-sex schools were more likely to "express specific interests in both mathematics and English," *id.* at 387, demonstrated

[3]Because of the scarcity of single-sex public schools in this country, several of the studies comparing single-sex and mixed-sex secondary schools have used data from private Catholic schools. For a discussion of the formal and informal structure of these Catholic schools, *see* Cornelius Riordan (hereinafter "Riordan (1990)") GIRLS AND BOYS IN SCHOOL: TOGETHER OR SEPARATE? 62-81 (1990).

"significantly greater gains in reading, science, and educational ambition over the course of their high school years," *id.* at 394, and had higher ratings for self-image and sense of personal control, *id.* at 386.

Professors Lee and Bryk attributed these positive results to the absence of distractions and pressures caused by members of the opposite sex:

> [S]ingle-sex secondary schooling may in fact serve to sensitize young women to their occupational and societal potentials in an atmosphere free of some of the social pressures that female adolescents experience in the presence of the opposite sex. Adolescence is a critical period for the formation of attitudes about oneself. It may be that some separation of students' academic and social environments removes the distractions that can interfere with the academic development of some students.

Id. at 394. A follow-up study based on additional data obtained after graduation demonstrated that the beneficial effects of single-sex high school experience persisted into the college years. *See* Valerie E. Lee & Helen M. Marks, *Sustained Effects of the Single-Sex Secondary School Experience on Attitudes, Behaviors, and Values in College*, 82 J. EDUC. PSYCHOL. 578 (1990) (hereinafter "Lee & Marks").[4]

[4]Although most of the studies analyzing the "High School and Beyond" data have found significant advantages for single-sex schools, one study found no significant effects. *See* Marsh, *Effects of Attending Single-Sex and Co-educational High Schools On Achievement, Attitudes, Behaviors and Sex Differences*, 81 J. EDUC. PSYCHOL. 70 (1989). Professors Lee and Bryk have criticized this study on methodological grounds. *See* Lee & Bryk, *Effects of Single-Sex Schools: Response to Marsh*, 81 J. EDUC. PSYCHOL. 647 (1989).

The work of Cornelius Riordan, an Associate Professor of Sociology at Providence College, supports these findings. Professor Riordan conducted three recent studies on single-sex education which culminated in a book, Riordan 1990, *supra*. In the first of these studies, Professor Riordan analyzed data from the "High School and Beyond" survey to examine the influence of single- and mixed-sex Catholic school education on advanced mathematics, writing, science, civics, self-esteem, and sense of personal control. *Id.* at 82-113. The results significantly favored the single-sex schools. On average, girls in the single-sex schools "score[d] about one-third of a grade equivalent higher than girls in mixed-sex schools," scoring "almost one full year" higher in science. *Id.* at 112. Girls in the single-sex category also scored higher on measures of self-esteem and personal control than did the girls in the mixed-sex category. *Id.* at 109-10.[5]

In the second of his three studies, Professor Riordan investigated the long-term outcomes of single-sex education. Riordan (1990), *supra*, at 114-15, 129-34. This study analyzed questionnaire and performance test data from the National Longitudinal Study of the High School Class of 1972, a survey that recorded performance test and questionnaire data from high school seniors in the year 1972,

[5]The results of Professor Riordan's 1990 study are consistent with an earlier study in which he compared the effects of single-sex Catholic, mixed-sex Catholic, and mixed-sex public schools. *See* Cornelius Riordan, *Public and Catholic Schooling: The Effects of Gender Context Policy*, 93 AM. J. EDUC. 518 (1985). Although Riordan found virtually no difference between the mixed-sex Catholic and mixed-sex public schools, the performance of students from the Catholic single-sex schools was significantly greater than the performance of students from the mixed-sex schools. *Id.* at 536.

and collected additional data from those same students for the years 1973, 1974, 1976, 1979 and 1986. Professor Riordan concluded that the beneficial effects of single-sex education on cognitive ability persist as many as seven years after graduation from high school. *Id.* at 134. In addition, the girls from the single-sex high schools "achieved higher education than their female counterparts from mixed-sex high schools." *Id.*

Professor Riordan's work also demonstrates that the benefits of single-sex education are not limited to the secondary school level. In the third of his three recent studies, he used the National Longitudinal Study of the High School Class of 1972 to compare data from women who had attended single-sex colleges. *Id.* at 116-28, 133-34. The study found that "women's colleges have a very strong influence on both educational and occupational achievement." *Id.* at 133.

In analyzing the results of his extensive research, Professor Riordan has concluded that

> [S]ingle-sex schools offer an environment that is more conducive to learning than mixed-sex schools, especially for women. They provide more role models for students, and they offer more order and control than mixed-sex schools. In all-girl schools, the adolescent climate is weak, allowing an academic climate to flourish.

Id. at 151.

Professor Riordan's results are consistent with a study by Daryl G. Smith, a Professor of Education and Psychology at the Claremont Graduate School. *See* Smith, *Women's Colleges and Coed Colleges: Is There A Difference For Women?*, 61 J. HIGHER EDUC. 181 (1990). Analyzing data from students enrolled in single-sex and coeducational colleges in 1982 and questioned four years later, Professor Smith found that "women's colleges relate positively to a variety of measures of student satisfaction, perceived

changes in skills and abilities, and educational aspirations and educational attainment." *Id.* at 191. Significantly, students from the women's colleges were more likely to obtain a degree from their institutions than their counterparts at the coeducational colleges. *Id.* at 191-92. Students from the women's colleges also gave high ratings to measures "having to do with the academic program of the institution and the contact with faculty and administration, as well as on perceived changes in values of tolerance and cultural awareness." *Id.* at 191. The only area where students from coeducational schools rated their experience more positively than did students from the women's colleges was in the area of social life.[6] *Id.* at 192.

Most recently, a study by doctoral candidate Mikyong Kim and Professor of Sociology Rodolfo Alvarez of the University of California at Los Angeles analyzed longitudinal data from women enrolled in single-sex and coeducational four-year colleges during the period 1987-91. Kim

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[6]Professor Smith analogized his findings to those of Professor Alexander Astin in FOUR CRITICAL YEARS: EFFECTS OF COLLEGE ON BELIEFS, ATTITUDES, AND KNOWLEDGE (1977). In a more recent study, Professor Astin has suggested that "institutional type, as such, has little direct effect on student development." *See* A. Astin, WHAT MATTERS IN COLLEGE? FOUR CRITICAL YEARS REVISITED 323 (1993). Nevertheless, Astin still found that attending a women's college was positively associated with numerous factors including baccalaureate completion, satisfaction with faculty and overall quality of instruction, leadership measures, writing skills, analytical and problem-solving skills and critical thinking ability. *Id.* at 324. Most of these positive effects were "directly attributable to attending a women's college" and could not "be entirely explained or accounted for on the basis of other characteristics, such as small size, residential emphasis, and private control." *Id.* at 325.

& Alvarez, *Women-Only Colleges: Some Unanticipated Consequences*, 66 J. HIGHER EDUC. 641 (1995). This study found that women's colleges were more effective than coeducational colleges in improving their students' academic ability and social self-confidence. *Id.* at 651, 653. The authors suggest that "a partial reason for the positive impact of women-only colleges is that their women students are surrounded by peers having high intellectual self-esteem." *Id.* at 651. The authors observe that "women-only colleges appear to provide students better opportunities to be actively involved in student organizations, to exercise leadership, and thus to improve their social self-confidence." *Id.* at 661.[7]

The authors conclude as follows:

> Finally, public policy makers would be well advised to continue support for women-only colleges. Social and financial support for women-only colleges should

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[7]The one area where the authors found no advantage or disadvantage to women's colleges was in preparation for entry into graduate or professional schools. The study also found that women seniors at coeducational colleges were more likely to have acquired job-related skills. Kim & Alvarez, *supra*, at 661. The authors suggest that these findings may be attributable in part to the fact that women's college faculty are disproportionately concentrated in the humanities and social sciences. *Id.* at 658. The authors also suggest that, despite these results, "women-only colleges' strength in developing social self-confidence as well as academic ability may provide a long-term foundation for higher proportions of career achievers among their graduates, compared to their coeducational counterparts." *Id.* at 661. Moreover, regardless of what may be the case at other women's colleges, MBC's undergraduate program has a strong emphasis on career development, and the VWIL program requires substantial course work in math and science.

> be based on demonstrated long-term organizational effectiveness among dimensions that are educationally important for women students, rather than on transitory views not supported by research.

Id. at 662.

B. Single-Sex Education Has Been Linked with Greater Career Achievement.

In addition to those studies that measure achievement through questionnaire data, performance tests, and school records, there are studies suggesting that women graduates of single-sex colleges are more likely than their peers at coeducational institutions to have been recognized for their career achievement.

In the first of these studies, Professor Elizabeth Tidball of George Washington University Medical Center analyzed a sample of randomly-selected women cited in "Who's Who of American Women." *See* Tidball, *Perspective on Academic Women and Affirmative Action*, 54 EDUC. REC. 130 (1973) (hereinafter "Tidball (1973)"). She concluded that, relative to the total number of their women graduates, the women's colleges produced a higher proportion of "achievers" than did the coeducational colleges. *Id.* at 132.

Some later studies have criticized the Tidball study on the ground that a disproportionate number of the "achievers" who had graduated during the years under study (1910 through 1940) were from the highly selective Seven Sisters Colleges (Barnard, Bryn Mawr, Radcliffe, Mount Holyoke, Smith, Vassar, and Wellesley). Notwithstanding these criticisms, more recent studies have suggested that women's colleges do play an important role in producing successful graduates. In one such study, Professor Tidball reanalyzed her own data and found that, relative to the total number of women graduates, "highly selective women's colleges were twice as likely to have produced achievers as were the highly selective coeducational colleges." *See* Tidball,

Women's Colleges and Women Achievers Revisited, 5 SIGNS: J. WOMEN CULTURE & SOC'Y 504, 512 (1980). "Similarly, all other women's colleges were twice as likely to have produced achievers as were all other coeducational colleges." *Id.* at 512.

A more recent study partially replicated Professor Tidball's results using data from women achievers who had graduated in more recent decades. Rice & Hemmings, *Women's Colleges and Women Achievers: An Up-date*, 13 SIGNS: J. WOMEN CULTURE & SOC'Y 546 (1988) (hereinafter "Rice & Hemmings"). Although the results were not statistically significant, the study found that in proportion to the total number of women graduates women's colleges had one and one-half as many graduates who were achievers as did the coeducational colleges during the decade of the 1970's. *Id.* at 556.

The success of women's colleges in producing a high rate of women achievers has been the subject of much discussion. Professor Tidball attributed her results to the prevalence of female faculty role models and mentors at women's colleges. She found that, for both single-sex and coeducational colleges, the number of "career-successful women graduates" increased as the ratio of women faculty members to women students increased. Tidball (1973), *supra*, at 135. Other researchers have similarly concluded that "[t]here seems little question that an environment in which many women teachers and mentors provide traditional and nontraditional examples of achievement is an advantage to young women." Rice & Hemmings, *supra*, at 558.[8]

[8]The Kim and Alvarez study, on the other hand, questions Tidball's hypothesis that the success of women's colleges is attributable to their higher proportion of female faculty members. They found that "percent of female faculty as a variable was *not* a significant positive predictor for any

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While it may be difficult to isolate the specific reasons why women's colleges have been successful in producing a high rate of women achievers, these studies indicate that women's colleges offer significant advantages over coeducational institutions.

C. Single-Sex Education Encourages Women to Pursue Male-Dominated Careers.

A diverse body of literature suggests that women attending single-sex schools may be more likely than their peers at coeducational schools to pursue male-dominated careers.

Following her pioneering study on women achievers in 1973, Professor Tidball performed three additional studies to examine the baccalaureate origins of scientists and scholars, men and women entering medical school, and men and women with natural science doctorates. *See* Tidball & Kistiakowsky, *Baccalaureate Origins of American Scientists and Scholars*, 198 SCI. 645 (1976); Tidball, *Baccalaureate Origins of Entrants into American Medical Schools*, 56 J. HIGHER EDUC. 385 (1985); Tidball, *Baccalaureate Origins of Recent Natural Science Doctorates*, 57 J. HIGHER EDUC. 606 (1986). In each of these studies, Professor Tidball found that, relative to the total number of women graduates, the women's colleges produced a significantly higher proportion of graduates in these fields of study than did coeducational colleges.

In another study, Professor of Sociology Marvin Bressler

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dimension of women students' development in any of our analyses." Kim & Alvarez, *supra*, at 661. Although these scholars found a supportive institutional environment to be generally quite important, they attribute much of the unique success of women's colleges to the nature of peer interactions among students. *Id.* at 661-62.

of Princeton University and his colleague Peter Wendell explored the impact of single-sex and mixed-sex colleges on career aspirations. *See* Bressler & Wendell, *The Sex Composition of Selective Colleges and Gender Differences in Career Aspirations*, 51 J. HIGHER EDUC. 660 (1980). Analyzing responses to a national survey of male and female undergraduates enrolled in single-sex and coeducational colleges, the study concluded that between freshman and senior year, there was a significant increase in the number of women from single-sex colleges who intended to pursue more "masculine" vocations. *Id.* at 660.[9] In contrast, the coeducational colleges had "no appreciable demonstrable influence on the career ambitions of either sex." *Id.* at 662. Based on these results, the researchers suggested that "sexual parity in the occupational domain might be better served if larger numbers of young women were to enroll in single-sex colleges." *Id.*

A more recent study analyzing questionnaire data from college women has suggested that single-sex education along with family structure plays an important role in influencing career choice. *See* Rubenfield & Gilroy, *Relationship Between College Women's Occupational Interest and a Single-Sex Environment*, 40 CAREER DEV. Q. 64 (1991). The study found that, although there are numerous factors that might affect a woman's career choice, "the opportunity to interact in a single-sex environment is important at some stage of a young women's life, if she is to develop non-traditional interests." *Id.* at 70.

These studies on career choice are consistent with other studies demonstrating that women who attend single-sex

[9]Among the "masculine" professions included in the study were college professor, lawyer, physician, accountant, business executive, business owner, engineer, scientific researcher, and religious professional.

colleges or high schools have less stereotypical views about gender roles than do women attending coeducational schools. Professor Lee and her colleagues have shown that women who attend single-sex high schools or single-sex colleges have less stereotypical views about the compatibility of work and motherhood, and the traditional role of men. Lee & Bryk (1986), *supra*, at 389; Lee & Marks, *supra*, at 584-85. Similarly, Professor Riordan demonstrated that women graduates of single-sex colleges and high schools hold "more liberal attitudes toward working women" and "much stronger views toward equal sex roles" than their peers at single-sex schools. *See* Riordan (1990), *supra* at 110, 133-34.

Yet another body of research has indicated that single-sex education may have a positive effect on women's participation and interest in the traditionally male-dominated fields of mathematics and science.[10] One study, for example, concluded that single-sex high school physics classes had a "statistically significant, positive influence upon girls' interest in physics-related careers, while mixed-sex classes may have had a slight negative influence." Stowe, *Should Physics Classes Be Single Sex?*, Physics Teacher, Sept., 1991, at 380.

A similar study of single-sex classes in post-primary

[10]A substantial number of studies have shown that girls generally participate less, receive less teacher attention, and show less interest and confidence than do boys in the subjects of mathematics and science. *See, e.g.*, American Association of University Women, *How Schools Shortchange Girls 24-30* (1992); American Association of University Women, *Shortchanging Girls, Shortchanging America 12-14* (1991); Becker, *Differential Treatment of Females and Males in Mathematics Classes*, 12 J. RES. MATHEMATICS EDUC. 40 (1981).

schools in Australia concluded that "students in single-sex classes indicated significantly higher gains in confidence over time than those in mixed-sex classes" and that this confidence "significantly increased the likelihood" of "subsequent participation" in mathematics. Rowe, *Single-Sex and Mixed-Sex Classes: The Effects of Class Type on Student Achievement, Confidence and Participation in Mathematics*, 32 AUSTRALIAN J. EDUC. 180, 195-96 (1988). These findings may be of critical importance given a recent study indicating that adolescents who like math and science "express stronger desires for careers as teachers, doctors and scientists" and "are more likely to aspire to careers as professionals." *American Association of University of Women, Shortchanging Girls, Shortchanging America 15* (1991).

III. REVERSAL OF THE DECISION BELOW WILL THREATEN THE CONTINUED EXISTENCE OF MARY BALDWIN AND OTHER PRIVATE WOMEN'S COLLEGES.

The government and some of its *amici* seek to reassure the Court and their constituencies that a decision against VMI in this case would have no implications for the continued existence of single-sex education for women, particularly at private institutions. In truth, a decision favoring the government in this case could produce substantial obstacles to any public or private educational program that admits only women.

A. Single-Gender Education Programs for Women Will Be Difficult to Justify on a Remedial Rationale.

The government and some of its *amici* have suggested that single-gender education for women can be sustained even if single-gender education for men were held to be unconstitutional, based on a theory of compensating for past discrimination. The legal predicate for this theory is weak.

This Court explicitly rejected such a compensatory rationale in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 727-28 (1982). The Court has made it clear that "benign" discrimination will not be automatically upheld on such a compensatory rationale and that a close fit must be established between past conduct violating the Constitution and a remedy limited to counteracting the effects of such conduct. It would be difficult for women's colleges to justify their admissions policies under this sort of scrutiny.[11]

Also problematic is the factual case for women's colleges as a remedy for past discrimination. Although discrimination against women undoubtedly persists in some ways, there is not much evidence that it inhibits access to a college education. In 1960, women comprised only about a third of the undergraduate college population and were excluded from most of the Ivy League colleges and a number of public colleges such as the University of Virginia. Today, women comprise approximately 55 percent of the nation's 14 million college students. U.S. Dep't of Commerce, STATISTICAL ABSTRACT OF THE UNITED STATES 179 (1995). Women today are substantially more likely to graduate from high school and to attend college than their male counterparts. U.S. Dep't of Commerce, *supra*, at 152, 153, 168. As a statistical matter, our educational system seems to be shortchanging men more than

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[11]Indeed, some of the government's amici seem to recognize as much, since they go so far as to argue that the Court should overrule such recent decisions as *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995), and *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), in order to hold that benign discrimination is not subject to the same degree of scrutiny as invidious discrimination. Brief of the Employment Law Center, et al., at 25-30.

women.[12]

In short, the educational system in this country is and has been for many years fully open to women. As a result, the "remedial" justification for women's colleges would not likely survive constitutional scrutiny in the event the Court were to hold that publicly supported single-sex education for men is unconstitutional.

B. Private Institutions Will Face a Loss of Government Financial Support.

It is also illusory to think that the impact of a constitutional ruling on single-gender education could be limited to public institutions. Although MBC is a private college, it receives substantial amounts of state and federal financial support. In addition to financial support of the VWIL program, the Commonwealth provides tuition assistance grants for its residents who attend MBC. It is unlikely that MBC or any other private women's college could survive without some form of government financial assistance to the school or its students.[13]

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[12]The problem is particularly severe for African American males. Only 38.5 percent of black college students are male. U.S. Dep't of Commerce, *supra*, at 179.

[13]Public funds directly or indirectly provide a substantial portion of the operating budgets of private educational institutions. In the 1990-91 school year, private institutions of higher education derived approximately 19 percent of their budgets from federal, state, and local government funds, *not including* financial aid to students. *See* U.S. Department of Education, National Center for Education Statistics, DIGEST OF EDUCATION STATISTICS 38 and Note (1993). In addition, private colleges and universities benefited from massive public expenditures for student financial aid in the form of grants and scholarships, guaranteed student loan programs, work study payments, and the like. More than 49 percent of full-time

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If the Supreme Court holds that the Equal Protection Clause bars government-supported single-sex education at VMI, that holding could well result in the invalidation of most or all governmental financial support for students attending private single-sex schools. This is not to say that the receipt of government assistance turns colleges into "state actors" who violate the Constitution by discriminating on the basis of sex. Rather, it is the government itself that would violate the Constitution by subsidizing private discrimination in which it could not engage directly.

In *Norwood v. Harrison*, 413 U.S. 455 (1973), black students challenged a Mississippi statutory program under which textbooks were purchased by the State and loaned to all students attending public and private schools in the State, including private schools alleged to have racially discriminatory admissions policies. Noting that "[t]his Court has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools," the Supreme Court held that "[a] textbook lending program is not legally distinguishable from the forms of state assistance foreclosed by . . . [those] cases." *Id.* at 463 (footnote and citation omitted). Accordingly, the Court held that even indirect government aid to racially discriminatory schools was barred by the Equal Protection Clause:

> Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that **a state may not induce, encourage or promote private persons to accomplish what it is constitu-**

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students attending private non-profit undergraduate institutions in 1989-90 received some form of federal financial aid, and more than 30 percent received state financial aid. *Id.* at 313.

tionally forbidden to accomplish.'"

Id. at 463-65 (footnote and citation omitted) (emphasis added).[14]

The *Norwood* Court's holding was not dependent on any showing of a direct causal link between the challenged state program and the discriminatory conduct of the private actors: "[T]he Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school." *Id.* at 465-66. In the Court's view, "the constitutional infirmity of the Mississippi textbook program is that it significantly aids the organization and continuation of a separate system of private schools which . . . may discriminate if they so desire. **A State's constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination."** *Id.* at 467 (emphasis added).

Direct public financial assistance to private single-sex schools obviously "giv[es] significant aid to" those institutions. Like the textbook program invalidated in *Norwood*, moreover, federal and state financial aid to students attending private single-sex schools also provides substantial benefits to those schools. As the Supreme Court said in *Grove City College v. Bell*, 465 U.S. 555, 565-66 (1984), "[t]he economic effect of direct and indirect assistance often is indistinguishable," and Congress made clear its "awareness that the student assistance programs established

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[14] *Accord Cooper v. Aaron*, 358 U.S. 1, 19 (1958) ("State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws.").

[by federal law] . . . would significantly aid colleges and universities." Under the holding of *Norwood*, if publicly supported single-sex education is unconstitutional, government financial aid to students attending private single-sex schools would appear to be equally impermissible.[15] Accordingly, an adverse decision in the VMI case could strike a severe financial blow to private single-sex education in this Nation both by invalidating all forms of direct public financial assistance to single-sex schools and by denying students at such schools access to a major source of financial aid.

C. Private Institutions Will Face a Loss of Charitable Tax Exemption and Tax Deductible Contributions.

Under the Internal Revenue Code, charitable organizations, including those organized for "educational" purposes, are generally exempt from federal income taxes, and taxpayers may deduct their contributions to such organizations. 26 U.S.C. §§ 170, 501(c)(3) (1988). In Rev. Rul. 71-447, 1971-2 C.B. 230, however, the IRS ruled that racially discriminatory private educational institutions are not entitled to these tax benefits. The IRS explained that "[a]ll charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy." *Id.* Because congressional enactments, judicial decisions, and the like evidenced a strong national policy against racial discrimination in education, the IRS concluded that racially discriminatory pri-

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[15] *See also Ridgefield Women's Political Caucus, Inc. v. Fossi*, 458 F. Supp. 117 (D. Conn. 1978) (Newman, J.) (applying *Norwood*, court enjoined town from conveying government property at below-market price to a private single-sex organization).

vate schools were contrary to this public policy and were therefore not "charitable" within the meaning of the Internal Revenue Code. *See also* Rev. Rul. 75-231, 1975-1 C.B. 158.

In *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), the Court upheld these IRS rulings, applying essentially the same rationale. Construing the tax code by reference to common-law principles, the Court first held that "an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy," because at common law "the purpose of a charitable trust may not be illegal or violate established public policy." *Id.* at 586, 591. The Court then concluded that racial discrimination in education is contrary to established public policy, pointing to cases such as *Brown v. Board of Education* that "establish[] beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy." *Id.* at 593. The Court also relied on congressional enactments prohibiting racial discrimination in federally funded educational programs and in other areas. *Id.* at 594.

Under the reasoning of Rev. Rul. 71-447 and *Bob Jones*, private single-sex educational and other charitable organizations could lose their tax-exempt status (and their all-important ability to receive tax-deductible charitable contributions) if public single-sex education such as that offered by VMI were declared unconstitutional. Indeed, one leading tax-law expert has already taken the position that a donation for educational purposes is contrary to public policy and generally not deductible if it discriminates on the basis of sex.[16] This argument would be difficult to re-

[16]*See* Martin D. Ginsburg, *Sex Discrimination and the IRS: Public Policy and the Charitable Deduction*, 10 TAX NOTES 27, 28 (1980) (the "generally applicable federal policy against sex discrimination" precludes charitable-deduction treatment

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fute if the Supreme Court were to invalidate public single-sex education in *VMI*. Just as *Brown v. Board of Education* demonstrated the public policy against racial discrimination in *all* education even though its holding and rationale applied only to public schools, so an unfavorable ruling in the VMI case would necessarily demonstrate a clear public policy against single-sex admissions policies in *all* education.[17] Even though Congress has not seen fit to prohibit such schools altogether,[18] this public policy could nevertheless preclude these schools and similar institutions from continuing to enjoy the benefits of tax-exempt status, and injured parties would be entitled to a judicial declaration precluding the IRS from according tax-exempt status or

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for a single-sex educational scholarship unless the donor can "show that the scholarship substantially furthers an important objective or is otherwise compatible with federal law"). Professor Ginsburg's article criticizes IRS Letter Ruling (Tech. Adv. Mem.) 77-44-007 (July 28, 1977), which upheld the deductibility of a contribution for a sex-restricted scholarship.

[17]The public policy against sex discrimination is sufficiently strong to constitute a compelling governmental interest. *See Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

[18]Title IX's prohibition against sex discrimination in federally funded education does not apply to most private educational institutions and contains an exemption for historically single-sex public institutions. *See* 20 U.S.C. § 1681(a)(1) & (5) (1988).

deductibility of contributions to such institutions.[19]

An unfavorable ruling in VMI would also threaten private single-sex schools and similar charitable organizations with loss of tax-exempt status for a separate and independent reason: under the rationale of *Norwood v. Harrison* and its progeny (discussed above), the Fourteenth Amendment and the equal protection component of the Fifth Amendment could be interpreted to preclude the federal and state governments from continuing to foster and support private sexual discrimination by extending tax-exempt status to organizations that engage in such behavior or by granting tax deductions to persons who contribute to such organizations.[20]

D. The Application of "Strict Scrutiny" Will Exacerbate the Threat to Private Women's Colleges.

Some of the government's *amici* have told the Court that cases such as *Norwood* and *Bob Jones* pose no threat to private women's colleges because these doctrines have been confined to situations involving race discrimination. Brief of Twenty-Six Private Women's Colleges at 19 n.12 & 20-23. Yet the rationale of these cases, as described above,

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[19] *See, e.g., Green v. Connally*, 330 F. Supp. 1150 (D.D.C.) (three-judge court), *aff'd*, 404 U.S. 997 (1971).

[20] *See, e.g., Falkenstein v. Department of Revenue*, 350 F. Supp. 887, 889 (D. Or. 1972) (three-judge court) ("the grant of tax exemptions to . . . a racially exclusive fraternal organization, violates the Equal Protection Clause of the Fourteenth Amendment and must be enjoined"), *appeal dismissed*, 409 U.S. 1099 (1973); *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972) (three-judge court); *Pitts v. Department of Revenue*, 333 F. Supp. 662, 669 (E.D. Wis. 1971) (three-judge court).

is broad enough to encompass other kinds of unconstitutional discrimination as well.

At the same time, the government and other of its *amici* have told this Court that sex discrimination should be treated the same as race discrimination and subjected to "strict scrutiny." Pet. Br. at 33-36; Brief of National Women's Law Center, *et al.*, at 15-30. Apart from whatever else could be said about such a legal development, it would certainly eliminate any remaining doubt that government assistance to private women's colleges would be viewed as unconstitutional.

CONCLUSION

For the reasons stated in this brief, *amicus curiae* Mary Baldwin College requests that this Court affirm the judgment of the court of appeals and permit it to continue implementation of the VWIL program.

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